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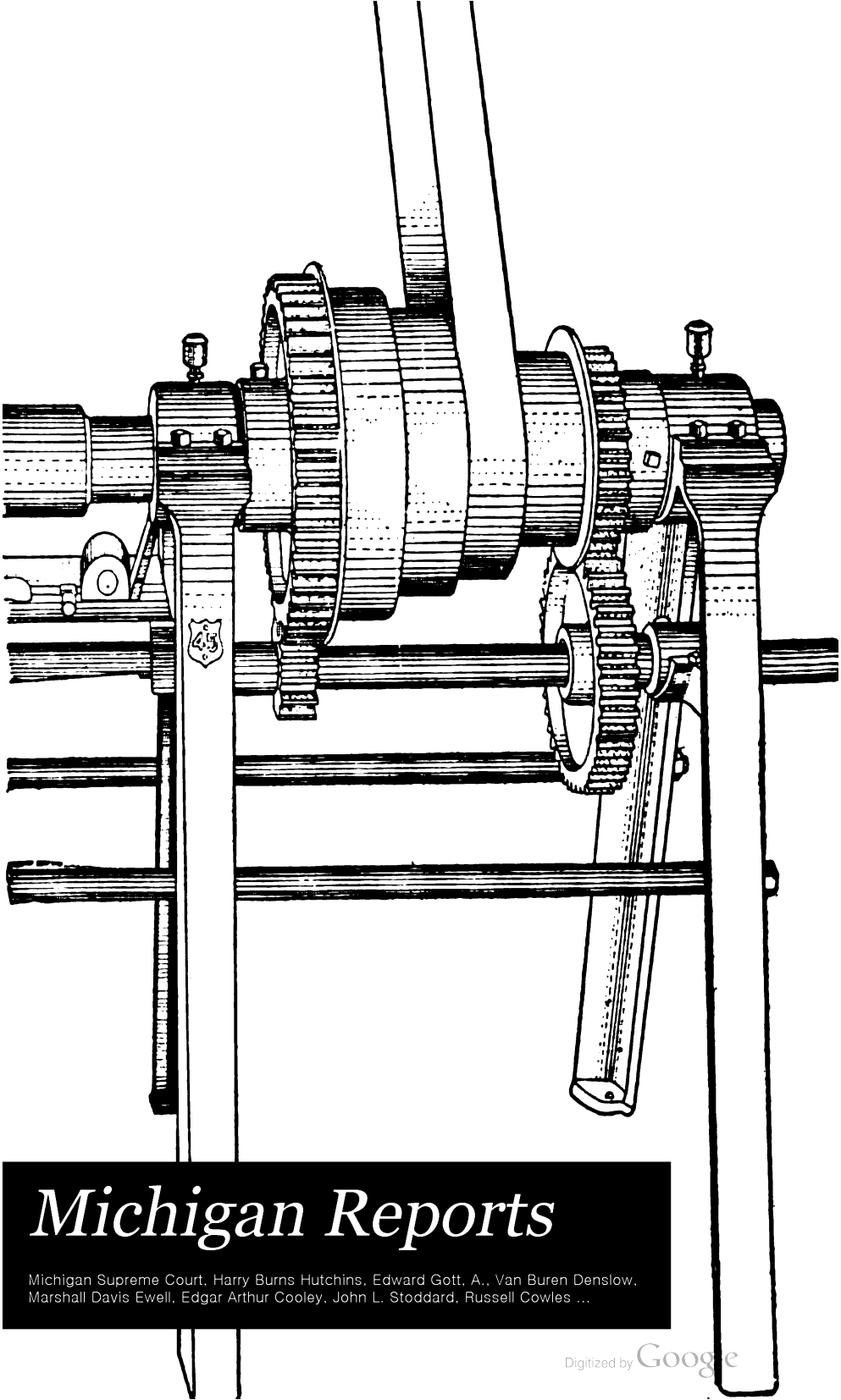

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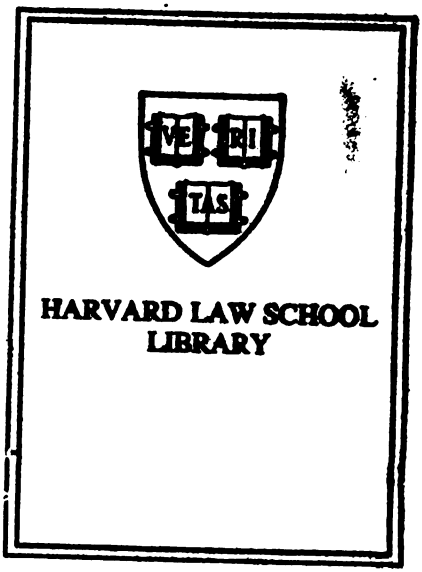

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

DECEMBER 29, 1911, TO MARCH 12, 1912

JAMES M. REASONER
STATE REPORTER

VOL. 168

FIRST EDITION

CHICAGO
CALLAGHAN AND COMPANY
1912

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SUPREME COURT.

CHIEF JUSTICE.

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JOSEPH B. MOORE,[2] LAPEER, ...	Dec. 31, 1913

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Pursuant to Act No. 182, Public Acts 1893, the Justices reside at Lansing during their terms of office.

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[2] From January 1, 1912.

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19.	CHARLES A. WITHEY,	REED CITY.

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34.	NELSON SHARPE,	WEST BRANCH.
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36.	L. BURGET DES VOIGNES,	CASSOPOLIS.
37.	WALTER H. NORTH,	BATTLE CREEK.
38.	CHARLES A. GOLDEN,	MONROE.
39.	JOHN L. O'MEALEY,	ADRIAN.

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JAMES PHELAN AND WILLIAM F. CONNOLLY.

SUPERIOR COURT OF GRAND RAPIDS, WILLIAM J. STUART.

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SUPREME COURT RULES 35, 36.

RULE 35. The party removing a cause into the Supreme Court by writ of error, appeal, certiorari, case-made, or otherwise, shall prepare a printed record for the use of court and counsel, which shall contain all the testimony and so much of the pleadings, record and proceedings (and no more) as are necessary to present the questions raised. The date of the official filing of each pleading set out or referred to in the record shall be stated. All records, arguments, and briefs printed for the use of this court shall be in small pica type, twenty-four pica "ems" to a line, thirty-five lines to a page, leaded with four-to-pica leads. The record shall have a suitable cover containing the title of the court and cause, the court from which the case is brought into this court, and the name of the judge before whom the cause was heard; the size of the records and briefs to be nine and one-quarter by six and one-quarter inches. The clerk is directed not to receive any record failing to meet the requirements of this rule.

As amended January 9, 1912, to take effect April 15, 1912.

RULE 36. The record shall contain a complete index of the names of witnesses whose testimony appears in such record, and the pages whereon the examination, cross-examination, or re-examination is found; also the pages whereon any exhibit appears, and in brief form the substance of such exhibit; and, in cases at law, the pages of the record where any exception relied on may be found. Such index shall be printed in the front of the record. The clerk is directed not to receive any record failing to meet the requirements of this rule.

As amended January 9, 1912 to take effect April 15, 1912.

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OCTOBER TERM, 1911.*

JONES *v.* PERE MARQUETTE RAILROAD CO.

1. RAILROADS — OPERATION OF TRAINS — NEGLIGENCE OF DISPATCHER

It was not negligence on the part of a train dispatcher to direct a regular train to proceed, after having informed a subordinate in charge of the local yard and the movement of trains, that the regular passenger train would not run over that portion of the line but would detour, where the train dispatcher had the right to expect, if any other train was permitted to proceed on the time of the passenger train, its crew would obey all rules and requirements of the company, which, if followed, would protect both trains.

2. SAME—EVIDENCE—RULES.

The meaning of printed or written rules and bulletins of a railroad corporation for the guidance of its employés is for the court unless some ambiguity is involved, and opinion evidence is not admissible to show their meaning.

3. SAME—LOCOMOTIVES—TRAINS—WORDS AND PHRASES.

Under provisions of defendant's rules that the word train should be understood to apply to an engine or more than one engine coupled, with or without cars, etc., a freight engine and its tender were included in a rule forbidding north-bound trains to use the south-bound track of a double-track system.

4. SAME—VIOLATIONS OF RULES—NOTICE.

A rule forbidding north-bound trains to use the south-bound track was not shown to have been changed by a custom to use the track inconsistently with such rule, under evidence that yard engines used both tracks in either direction, under the direction of a yardmaster, but not on the time of regular trains, and under special precautions for protecting them, or that a dummy train was permitted by authority to use the south-bound track in running north, or that passenger and freight engines took the left track to go to the roundhouse; defendant employing a man to see the rules were obeyed, so

*Continued from Vol. 167.

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far as possible, and keeping the rules and bulletins posted in conspicuous places. MOORE and BLAIR, JJ., dissenting.

5. SAME.

It is only where the defendant has sanctioned a custom to violate its rules that they will be deemed abrogated.[1]

6. SAME.

Plaintiff was guilty of contributory negligence in using the south-bound track to go north with his locomotive. MOORE and BLAIR, JJ., dissenting.

7. WITNESSES — EVIDENCE — ADVERSE OR HOSTILE WITNESS — STATUTES.

Under Act No. 307, Pub. Acts 1909, permitting a party to call for cross-examination agents and employés of the opposite party, the testimony of defendant's employés or servants so introduced by plaintiff was a part of his case, and the witnesses were not defendant's witnesses.

Error to Kent; Perkins, J. Submitted January 4, 1911. (Docket No. 16.) Resubmitted October 17, 1911. Decided December 29, 1911.

Case by Clarence Jones against the Pere Marquette Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed and no new trial ordered.

Bills, Streeter & Parker (*Charles E. Ward*, of counsel), for appellant.

Charles G. Turner and *M. A. Nichols*, for appellee.

OSTRANDER, C. J. The plaintiff, formerly a railroad engineer on the defendant's railroad, was injured in a collision between his engine and a passenger train known as No. 8, running between Grand Rapids and Chicago. The collision occurred in defendant's yard near Grand Rapids, known as "Wyoming yard." Defendant's track was a double main track, running southerly from Godfrey avenue or thereabouts at Grand Rapids through Wyoming yard to a point where the Lake Shore road crosses defend-

[1] Duties of master and servant as to rules promulgated for conduct of business, see notes in 43 L. R. A. 306, 10 L. R. A. (N. S.) 772.

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ant's road. Beyond that it was a single track. A double-track main also existed on the Detroit branch, extending from Oakland to or near Oakland avenue, where it connected with the Chicago line. A Y extended from the Detroit line to a switching station, known as "Sunny Side," upon the Chicago line, over which freight trains on or for the eastern branch go to and from the Wyoming yard, which was located a mile or so southwest of Sunny Side. A half a mile or more southwest from Sunny Side, and at the north entrance of Wyoming yard, was another switchman's station, known as "Plaster Creek." Wyoming yard extended a mile south of Plaster Creek, and a short distance south of the south entrance to the yard, perhaps a quarter of a mile or more, was the Lake Shore crossing. At each end of the yard, and also at Sunny Side, was a cross-over, used for engines and trains to cross from one main to the other. The rule of the road was to use the right-hand main. All trains going south were expected to take the westerly track and north-bound trains the easterly track. On the night of the collision plaintiff approached Sunny Side from the east about 11:35 p. m., and this was five minutes after the regular time for No. 8 to leave Grand Rapids for Chicago, which he knew, and he also knew that No. 8 had the right of way over his train. He accordingly inquired of the switch tender where No. 8 was, or if it had gone, or made some other similar inquiry, and was informed that No. 8 was not going over this road that night, but was going to detour over the Grand Rapids & Indiana and Michigan Central, owing to a washout at Saugatuck, some 40 or more miles southwest of Grand Rapids. He accordingly proceeded. The switch was thrown, and he entered upon the north-bound main, protected in crossing from both ways by the target, which, when thrown, showed to all trains on the main line that such mains were blocked. Knowing that they were upon the time of No. 8, and having no written order in relation to No. 8, his train, after crossing the north-bound main to the south-

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bound main, proceeded south with due caution; *i. e.*, the conductor stood on the rear platform with the proper lights and fuses, as required by rule 99, ready to use the same upon the appearance of any train following. Plaintiff proceeded down to Plaster Creek, expecting to then take a switch at the north end of Wyoming yard. The Plaster Creek switchman stopped him, and gave him information that the yardmaster directed that he go south through the yard and back in on a switch, and this he did, and the switchman testified that he watched his rear lights all the way down, and saw that he backed in "clear." While he was executing this maneuver—*i. e.*, backing in—the target at the south end was thrown by his brakeman or the yardmaster, thus protecting him against trains from both directions, as it indicated that the mains were blocked. His train being safely on the switch, it remained for him to take his engine to the roundhouse. He therefore backed out onto the south-bound main, and, had he followed the rule to use the right main, would have run south about three car lengths to the cross-over, and gone over that to the north-bound main, which the yardmaster expected him to do, as he said he would set the target on that main against any train from the west. Instead of doing so, after getting clear of the switch, plaintiff started north on the south-bound main. His conductor had left the rear of the train and started to walk up to the Wyoming office, situated about midway of the yard, taking the south-bound main to avoid the danger of being run down by any engine or train from the south, upon the assumption that only south-bound engines or trains would be on that track. He had a narrow escape from being run down by plaintiff's engine. Meantime No. 8 had received no order to detour, but, instead, a clearance order over defendant's own road, and, although plaintiff saw the headlight coming, he supposed it was a dummy that made regular trips to Wyoming station, and kept on. This resulted in a collision, in which both engines were wrecked, plaintiff

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was injured, his fireman killed, and one or more of the crew of the passenger engine and several passengers were injured. An inquest was held over the remains of plaintiff's fireman, and plaintiff was a witness, and stated one or more times, in describing how the accident occurred, that he was on the wrong main, and was run into by No. 8, which he had supposed was going to detour. Afterwards plaintiff brought this action and recovered a verdict and judgment for $15,000 for his injuries, and the defendant has appealed.

If the foregoing statement were all there is to this case, it would seem that, not only was the plaintiff guilty of contributory negligence, but that there would be more reason for his being before the court as a defendant than plaintiff at the suit of all of the injured members of the two train crews and passengers, if he was fortunate enough, as he seems to have been, to avoid a charge of manslaughter, as it clearly appears that he deliberately violated the written rule of the company in proceeding north with his engine on a south-bound main, knowing both the rule and the fact that he was on the time of No. 8 south bound, which he knew was, as the sequel proved, a most hazardous thing to do under ordinary, or for that matter unusual, circumstances, against which the rule was plainly designed to provide and protect, and for which violation he was liable to a fine of $25 and three months' imprisonment under the general laws of this State, "and any conductor, engineer, servant, or other employé of any such railroad corporation, who shall knowingly violate any of the printed or written rules or regulations of such company, shall be subject to a fine of not less than twenty-five dollars nor more than one hundred dollars, or to an imprisonment in the county jail not more than three months, or both such fine and imprisonment, in the discretion of the court" (2 Comp. Laws, § 6286), of which he was advised by the book of rules in his possession. The excuse made for his misconduct was his own convenience in avoiding the delay of

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having a few switches thrown and the alleged custom of disobeying or disregarding the rule that all trains should use the right-hand main, together with his belief that No. 8 would detour, upon which belief the rules clearly forbade his relying without taking the precautions provided and required by rules and bulletins.

The negligence alleged and relied on is that the train dispatcher, after informing the yardmaster that No. 8 would detour, sent the train out from Grand Rapids some 35 or more minutes later without first notifying the yard office of his intention to do so. The plaintiff could not have known it had this been done, as he and the yardmaster were half a mile from the office at that time.

The undisputed facts are: That for several days a weak bridge at Saugatuck, some 40 or more miles west of Grand Rapids, had made it necessary to detour No. 8 via Grand Rapids & Indiana and Michigan Central roads; and, while on this evening orders were given to hold No. 8 for a time in the hope that it might avoid the detour, it was expected that the train would detour. Knowing that No. 8 had detoured on previous days, and with a view to the entrance of plaintiff's train, which he expected to arrive soon, the yardmaster telephoned the dispatcher to know what was to be done with No. 8, and was informed that it would detour. This was about 11:15. He thereupon informed the switchman at Plaster Creek of the fact, and directed him to inform plaintiff not to take the switch at the north end of the yard, but to proceed south through the yard and back in from the south. We have seen that the switchman at Sunny Side was also informed that No. 8 would detour. Hence he informed plaintiff, and he proceeded via south main to the south end of the yard by direction of the Plaster Creek switchman, where he found the yardmaster awaiting him. He entered upon the south-bound main at 11:35, being about five or ten minutes before the regular time for No. 8 at Sunny Side, by direction of the yardmaster through the switchman. Meantime No. 8 was being held in the hope that she

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might proceed via the Pere Marquette line, and at about 11:50 clearance orders were given, and the train departed with the result above stated. We must therefore inquire whether this was negligence in the train dispatcher.

The proposition is that, having stated to the yardmaster that No. 8 would detour, it was negligent to send the train out without informing the yardmaster of the change before doing so. This will depend upon the printed rules and bulletins and the practice of the road and what the dispatcher had a right to understand and expect. The bulletins and rules were in writing, and the plaintiff, yardmaster, and switchman all had copies of the latter. Their meaning was a question for the court, and a large amount of opinion evidence as to their meaning was erroneously admitted. The dispatcher had a right to expect that the rules and bulletins would be obeyed by all. Assuming that he knew when he told the yardmaster at 11:20 that the train would detour, that the yardmaster would admit plaintiff's extra freight into the yard on the time of No. 8, which he did at 11:35, he knew that, if the rules should be obeyed, the only thing that could happen would be the delay to No. 8 which might be caused thereby. The reason for saying this is that he knew that No. 8 could not pass the Sunny Side switch without the signal required to be given by the switchman, who would be acting under rules 590 and 591, and would not "give the proceed signal unless all was right." He knew, also, that the same would be true at the Plaster Creek switch. Furthermore, he knew that, in the event of the failure of the switchman to block No. 8 if necessary, the plaintiff's train would be protected by its conductor under rule 99, as was done, and that in executing the switching movement at the south end of Wyoming yard the plaintiff's train would be protected by the south board, which it was the engineer's duty to cause to be displayed until he was "in clear" on the switch. So far the plaintiff had acted in obedience to the rules and the directions of the yardmaster, and no harm had befallen him. The Plaster Creek switchman,

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who could see the entire length of the yard, had seen his lights go off from the main line before No. 8 passed his switch. His conductor had stood at his post, fuses in hand, and lamps burning, until the train was out of danger. Then, his work done, he started for the yard office, leaving the engineer to take his engine to the roundhouse, which he could have done without going upon the main track, or by way of the north-bound main, under protection of the yardmaster. At this point he departed from the rules. It is a significant fact that there is no evidence that any other engine was on either main, not even a yard engine. All were "in clear" because they were on the regular time of No. 8. Even the dummy, which was scheduled to run every 40 minutes or so, was safely sidetracked, awaiting No. 8 or such other train as might be sent out on her time; for, if No. 8 detoured, it would leave the towns between Grand Rapids and Saugatuck without train service unless another train should be sent over that portion of the road, as was sometimes done where trains detoured. It is manifest that, if the rules were obeyed, the dispatcher would have a right to assume that any train going south would be under protection, and that no train would be coming north on a south-bound main on the time of No. 8, and it is clear that, having a right to proceed on the theory of obedience to the rules, he cannot be said to have been negligent in giving a clearance order at 11:55 without first calling up the yard office, and seeing that the west main was clear. See *Veit* v. *Railroad Co.*, 150 Mich. 366 (114 N. W. 236), where we said:

"The train dispatcher was not chargeable with notice that if the crew of No. 42 returned to Mesick, as he expected they might, they would disregard the well-understood rules made largely for the protection of their own lives. He had a right to rely upon the observance of the rules by the trainmen, and to give his orders upon that basis. There is no evidence in this case to affect the right of the dispatcher to rely upon an observance of the rules, without which reliance he could not conduct the train movements of the road."

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See, also, *Enright* v. *Railway Co.*, 93 Mich. 409, 412, 413 (53 N. W. 536); *Whalen* v. *Railroad Co.*, 114 Mich. 512, 524 (72 N. W. 323).

Plaintiff's counsel appear to have recognized the force of this, and, to avoid such conclusion, attempt to convince the jury, first, that these bulletins did not apply to light engines because they mentioned trains only, and engines were not trains, and therefore there was nothing prohibiting such engines from using the left mains; and, second, that this engineer did not violate the bulletin because he did use the right-hand track when taking his train through the yard, and it was the same track when he returned with the engine, and therefore he was still using that same right-hand main. That the word "trains" included light engines other than yard engines appears from the first definition in the book of rules, viz.:

"Train—An engine, or more than one engine coupled, with or without cars; displaying markers."

The other proposition requires no discussion. The main contest, however, centers in the claim that, by reason of the custom, the plaintiff had the right to go north on the south-bound main on the time of No. 8, believing that it would not run.

We have examined the rules and bulletins, and we hold *first*, that they are to be construed by the court, and opinion evidence as to what they meant was not admissible; *second*, that under these rules No. 8 was not annulled by the telephone message to the yardmaster, or in any other way, and the plaintiff had no right to consider it so; *third*, that, whether supposed to be annulled or not, the bulletins forbade plaintiff to run his engine north on a south-bound main on the time of a regular train, or, for that matter, at any time; *fourth*, the evidence, such as it was, that it was the custom to run trains north on the south-bound mains, consisted of the following:

(*a*) The yard engines were used on both mains in both directions. This was permitted under the direction of the

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yardmaster when not on the time of regular trains and they were properly protected.

(*b*) The dummy ran from near Union Station to Wyoming yard station on the south-bound main. There being no cross-over at that point, it backed up to the cross-over at Plaster Creek. Both of these were allowed by authority, and cannot be considered as an abrogation of the general rule that "trains will use the right-hand track" and run with the course of traffic.

(*c*) Testimony of the plaintiff and one or two other witnesses that they had seen passenger and freight engines take the left-hand track to go to the roundhouse.

This testimony was meager, and was contradicted by several witnesses who were in a position to know. It did not justify an inference that the defendant knew and consented to the abrogation of this general rule, leaving engineers and trainmen to use either track at will. It is inconsistent with the object of a double track. Moreover, it appears that those bulletins are kept posted in conspicuous places, and the rules require that they be read by the engineers before every trip. Again, a man was employed whose duty and business it was to instruct new men as to the rules and bulletins. Again, the plaintiff admitted that he knew it was his duty to report infractions of these rules, and he did not do it when he saw them, thereby indicating the bad faith of all these claims. We should grant a new trial if for no other reason than that the judgment was contrary to the evidence.

The plaintiff's case reached a point upon the trial where it was made to turn on the proposition that the rule requiring engineers to use the right-hand main was abrogated by the tacit assent to a custom so common and general as to justify the conclusion that the managing officer having the making and abolition of rules knew of and approved the violation. Counsel for plaintiff cite the case of *Fluhrer* v. *Railway Co.*, 121 Mich. 212 (80 N. W. 23), as sustaining the rule upon which they rest this point. That was a case where a brakeman was injured in coupl-

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ing cars. Mr. Justice GRANT there said, with the approval of his associates:

"It is well settled that a violation of the rules of the company will defeat recovery. The exception to this is where the company itself has sanctioned the custom of its employés to act in violation of the rules, and has thus virtually abrogated them. This exception is based upon the theory that it would be unjust in employers to establish rules, and then sanction their violation, and interpose such violation as a defense. *Hunn* v. *Railroad Co.*, 78 Mich. 513, 526 (44 N. W. 502, 7 L. R. A. 500); *Eastman* v. *Railway Co.*, 101 Mich. 597, 602 (60 N. W. 309). Fairly construed, the above rule is notice to brakemen not to enter between the cars while in motion, to uncouple them, and an agreement not to do so. The danger in doing so is apparent. Only when this rule is violated by brakemen so universally and notoriously that it is a fair inference that the company sanctioned and approved the violation is the company barred from this defense. The court instructed the jury that if they believed that the motion of the cars was so slow that it was not negligence to pass between them to uncouple them, and that such was the usual custom of brakemen under like circumstances, then such act would not necessarily prevent recovery by the plaintiff. There was evidence tending to show that it was usual and customary for brakemen to pass between the cars while in motion to uncouple them. The case was not submitted to the jury upon the theory that the company had sanctioned a violation of this rule. The question was not referred to in the instructions. Under the instructions given, this rule was virtually thrown out of consideration, and the jury permitted to find that, if it was customary for brakemen to do this, then it was not negligence on the part of the deceased. Custom alone is not sufficient. It was held in *Glover* v. *Scotten*, 82 Mich. 369 (46 N. W. 936), that where a safe place was provided for switchmen to ride, and they chose to ride in a more dangerous one, and always did so, that would not relieve them from contributory negligence. When the defendant had entered into the contract with the deceased, in which he acknowledged the receipt of a copy of these rules, and agreed to abide by them, it had met the plaintiff's case, even though it was not negligence *per se* to go between the cars when in motion. The *onus probandi* was then cast upon the

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plaintiff to show that the company sanctioned a departure from the rule by a custom so universal and notorious that the company was presumed to have had knowledge of it and to have ratified it."

The later case of *Nichols* v. *Railway Co.*, 125 Mich. 394 (84 N. W. 470), was reversed for the reason that the court erred in his instruction upon this subject. In the case of *Ball* v. *Hauser*, 129 Mich. 401 (89 N. W. 50), we said:

"Whatever we might conclude, were it necessary to pass upon the question, it is apparent from the cases cited that, even in railroad cases, recovery is permitted only when the testimony shows that the rule has been abrogated, and this may be inferred from the circumstances fairly establishing it. If that rule should be applied to this class of cases, we must inquire whether this proof warrants such a conclusion. The plaintiff claims that his proof does warrant it, because he has shown by testimony that some of the men have been in the habit of riding on the elevator; that one of the defendants had seen it done without remark; that he rode on the elevator himself; and that in taking up some kinds of freight it was necessary that a man should ride.

"The fact that some of the men rode down upon the elevator, even if occasionally seen by the defendants without remark, is not inconsistent with the claim that said rule was relied on, and not abrogated. Neither does the fact that one of the defendants rode upon it indicate an intention to permit the men to do so. Nor does the fact that it was necessary for men to ride up occasionally with bulky articles, if it was necessary, establish the abrogation of the rule. Even if it could be said to justify the plaintiff in riding up, it does not tend to show a consent that he should unnecessarily ride down in violation of the rule, which he must have understood from the notice, and which, if the testimony of other witnesses is true, he was repeatedly warned against doing. We think the testimony offered does not establish the claim that the defendants sanctioned such use of the elevator. Not only does this testimony not prove it, but much evidence tends to disprove it. The defendants are not shown to have found it necessary to send men up on the elevator with their materials, or that they expected that Nordella & Owen would do so. They stationed a man at the top to receive material, a

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part of whose duty it was to warn men against riding down, which he is shown to have done repeatedly. The engineer below performed a similar duty at defendants' direction; and the defendants at different times told men not to ride upon the elevator. The witness Brogden says that he repeatedly told Ball to keep off from it, and that he was in the habit of jumping on while it was in motion. It was the general custom for the men to go up and down on the ladders provided for the purpose. None of these things was disputed, except that Ball denies being warned to keep off, thereby contradicting several witnesses. This denial raised a question of fact as to that point, and we must therefore assume that he was not warned; but that, and the fact that he and others sometimes rode, do not prove that the rule was abrogated by defendants' sanction, nor did it warrant the judge's leaving the question to the jury. The undisputed proof shows that the defendants were insisting upon their rule. It was not their duty to hire men to warn others not to disobey a known direction; yet they did it. One warning would ordinarily be enough; yet these defendants not only kept the printed notice up, and men to enforce it at each end of the route, but themselves sometimes reproved men who still persisted in riding. An employer ought to have some rights which his employés are bound to respect. There is nothing to compel them to afford elevator transportation, or to preclude their providing for carrying freight to the exclusion of passengers without being liable to such as shall insist on riding in violation of instructions."

In the present case, as in that, there was an absence of testimony that defendant's officers who manage and make rules knew or ever heard of any violations of the rule. They persisted in handing out their rules and keeping the bulletins posted, and, as in the other case, they kept a man whose duty it was to see that they were obeyed so far as possible. There was a failure to show an abrogation of this rule, and the court should have so instructed the jury.

The law requires the making of regulations and rules by railroads. It punishes men who disobey them by fine and imprisonment. It is a startling proposition to men who travel on railroads that a regulation requiring engineers to observe the common rule of the road and keep to the

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right track may be disobeyed with impunity whenever an employé may have reason to think a particular train will not run, and not only that, but, after causing the death of one, painful injury to several, and wrecking his employer's property and subjecting it to the payment of damages to its passengers, he may still sue the employer and recover large damages upon the theory that his criminal disobedience was invited by reason of the employer's failure to anticipate and provide against it by taking him into its confidence, to the general demoralization of its business. Railroading is a matter of minutes and seconds. A dispatcher's office must depend upon rules and the obedience of station agents, telegraphers, engineers, conductors, and switchmen. Great care is taken to protect the public against the consequences of disobedience or mistake. The rules do not permit an engineer to go unprotected on the time of a regular train, even though he has reason to believe it will not run. He is still required to protect against accident by obeying the rule, and it is made criminal to do otherwise. Written rules of railroad companies cannot be treated as abrogated by such railroad companies on testimony tending to show nothing more substantial than insubordinate and unreported criminal disobedience on the part of some of the employés. This is simply a case of "taking a chance," whereby many others "were made to take chances."

There is another question that we refer to, not because it is necessary to a disposition of this case, but because it has arisen in other cases. It involves the statute (Act No. 307, Pub. Acts 1909), which provides:

"An act to authorize parties litigant, when they call as witnesses in their behalf the opposite party, employé or agent of said party, to cross-examine such witnesses, and providing that they shall not be bound by their answers.

"The People of the State of Michigan enact:

"SECTION 1. Hereafter in any suit or proceeding in any court of law or equity in this State, either party, if he shall call as a witness in his behalf the opposite party, employé

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or agent of said opposite party, or any person who at the time of the happening of the transaction out of which such suit or proceeding grew, was an employé or agent of the opposite party, shall have the right to cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true."

It was the claim of the plaintiff's counsel that, under this statute, they were entitled to call as witnesses any persons who were in the employ of the defendant at the time of the accident, and obtain the benefit of their testimony without being bound by it. They insisted that the witnesses so called were not their witnesses, but the defendant's witnesses, and that any testimony given by them was not a part of the plaintiff's case except in so far as plaintiff wished to make it such. Relying on this theory, they called witnesses Perry, Lawless, Venneman, Bays, Hibner, and Snyder. The title would seem to be enough to show that these were not to be called as defendant's witnesses. They are there referred to as employés or agents of the opposite party and as witnesses called in behalf of the party calling them. The act allows such witnesses to be cross-examined and contradicted by the party calling them. The provision that such calling shall not interfere with their right to contradict or deny the truth of their statements conferred no new right. This act does not give the right to make them the witnesses of the adversary of the party calling them.

We have gone carefully over the record and briefs of counsel, and are constrained to say that defendant has not been shown to be negligent, that plaintiff was negligent in his disobedience of the rules of the road, which was the sole cause of his injury, and, being fully convinced that under no theory can plaintiff ever justly recover damages growing out of this transaction, the judgment is reversed, and a new trial is denied.

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STEERE, MCALVAY, BROOKE, and STONE, JJ., concurred with OSTRANDER, C. J.

BLAIR, J. (*dissenting*). In my opinion it was at least a fair question for the jury as to whether it was negligence on the part of defendant for the train dispatcher to send out train No. 8 without giving notice to the yardmaster of his intention to do so; he knowing that the yardmaster, acting upon the information furnished to him "just before No. 8 leaving time or just after," would be likely to use the main tracks as yard tracks so far as No. 8 was concerned.

I am also of the opinion that the judge did not err in submitting to the jury the question of plaintiff's contributory negligence. The negligence of plaintiff is to be considered with reference to the information, communicated to him through proper channels by the train dispatcher, that No. 8 would detour as it had been detouring for several days. While the violation of a rule is evidence of negligence, as in the case of the violation of an ordinance, it is not under all circumstances conclusive evidence of negligence. The train dispatcher controls the movement of trains, and, in my opinion, it should not be held that, as a matter of law, it is negligence *per se* for the employés to rely and act upon his information as to the movement of trains. Even though it was negligence in the abstract to go upon the south main track, it might not be negligence as to train No. 8, which plaintiff, as a reasoning human being, had a right to believe he need not consider. *Garrity* v. *Railway Co.*, 112 Mich. 369 (70 N. W. 1018, 37 L. R. A. 529); *Philip* v. *Heraty*, 135 Mich. 446 (97 N. W. 963, 100 N. W. 186); *Cook* v. *Johnston*, 58 Mich. 437 (25 N. W. 388, 55 Am. Rep. 703); *Sterling* v. *City of Detroit*, 134 Mich. 22 (95 N. W. 986); *Tyler* v. *Nelson*, 109 Mich. 37 (66 N. W. 671); *Buxton* v. *Ainsworth*, 138 Mich. 532 (101 N. W. 817).

Counsel for defendant say in their brief, after referring

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to the orders given by the yardmaster orally and by telephone, as to movements of trains on the yard side tracks, and occasionally on the yard main tracks:

"There is a wide distinction between the above kind of orders, which are almost always communicated around yards by telephone or word of mouth, and orders allowing an engineer to use a main track on the time of a superior train. Main tracks through yards still retain their character as main tracks, and are under control of the train dispatcher. Yard engines often use these tracks, but, before doing so, they must know that no regular trains are due and no special trains with superior rights through the yards. On these main tracks various classes of trains move and a complicated system of rights has grown up to control their movements. Under this system the only man who can annul a regular train inside Wyoming yards is the dispatcher. As far as an engineer moving on a main track in Wyoming yards is concerned, he is entitled to believe that a regular train is annulled only when he has in his possession a written order from the dispatcher to that effect. No yardmaster or switch tender can annul a regular train in Wyoming yards under the rules, and, under the rules, the dispatcher cannot annul a regular train except by written order. There is absolutely no evidence in this record to show that in Wyoming yards or outside of it any train was ever annulled except by written order sent out by the dispatcher. The failure to appreciate the respective jurisdictions of the yardmaster and of the dispatcher in Wyoming yards, as established by the rules and practices of the defendant, the failure of the court to grasp the idea that the yardmaster controls yard tracks, and to some extent main tracks off the time of regular trains, but that the dispatcher is supreme over regular trains on main tracks, and that nobody is entitled to assume anything as to the movement of one of these regular trains on a main track, unless he had in his possession an order from the dispatcher, was one of the principal causes of the error of the court in this case."

And again:

"Movements on the main line when regular trains are not due may properly be directed and controlled by the yardmaster, for he has the means of knowing all the

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trains that are on those tracks at that time. In that case the main tracks are treated for the time being as yard tracks, and all engines move on them under control, looking out for themselves and each other. To give the yardmaster control over such movements is a thing commonly done, and is a very different thing from giving him or any one under him the right to let an engine go out on the main track on the time of a regular train which has the right of way, does not run under control, and over whose movements the yardmaster has no jurisdiction. * * * When regular trains are not due through the yards, the yardmaster has the right to use the main tracks for switching movements, for the purpose of getting trains and cars from one part of the yard to another. The yardmaster has no control over regular trains, and their rights on the main track, when due, are paramount to any rights that he or any one under him can give. * * * On the night of the accident and a short time before No. 8 was due to leave the Union Station, the yardmaster at Wyoming yard called the dispatcher's office on the public telephone, and inquired if it was the intention to detour No. 8 that night in the same way that it had been detoured other nights. He was informed that it was the intention. The yardmaster communicated this information to the switch tenders. This communication was for the purpose of advising them that they could let a south-bound freight train into the yards without incurring a delay for No. 8, as explained above."

Mr. Lawless, the night yardmaster, testified:

"That night I called up the dispatcher's office on the telephone. I asked him how No. 8 was going. Before that I had been outside, and I came into the yard office at Wyoming yards. If I remember right, the clerk had called up the dispatcher before that time, and the clerk told me that No. 8 was going over the G. R. & I. or over some other road. I do not remember which. I then called up the dispatcher's office personally, and a man by the name of Booman, an operator in the dispatcher's office, answered. The operator gave me the information. * * *

"*Q.* But whatever was the information the operator gave you came from the dispatcher, didn't it?

"*A.* That is the way I understood it to be. * * * I believed what he said, but, as far as running the train against that other man, I would never have done it.

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"Q. Didn't you rely upon the statement or information that you had there that No. 8 was going to detour over the G. R. & I.?

"A. I believed it at that time, yes, sir; believed that they were going to detour that certain train.

"Q. And you relied upon that, didn't you?

"A. In that one certain train of cars; yes, sir. I think I called up there between 11:25 and 11:30 p. m. It was either just before No. 8 leaving time or just after.

"Q. And, of course, you relied then upon the fact that this particular train No. 8 was going around over the G. R. & I., didn't you?

"A. As far as that train of cars is concerned; yes, sir. * * *

"Q. Suppose you received a message over the wire that No. 8 was going by the way of G. R. & I., would you have a right to rely on the fact that it was going on the G. R. & I.?

"A. As far as that train No. 8 would go on there, that particular train of cars was going that way, that would be simply giving me the advice. That would be no annulment of train No. 8. * * * At the time I called up the dispatcher's office, I was told that No. 8 was going to detour over the G. R. & I."

The train dispatcher testified:

"Our first instructions were that No. 8 was to go the regular way, and afterwards it was changed to go via the G. R. & I., and then, after that, it was changed back to the original route.

"Q. Now, what I want to get at is what did he tell you that he told the night yardmaster, or what did you tell him to tell him at the time he called up?

"A. Now, he was in communication with Mr. Quinlan about that and what passed between the operator and I, I could not say, but he kept me posted—

"Q. Now, to refresh your recollection, didn't he tell you or you tell him that he had informed the night yardmaster that No. 8 was going to detour over the G. R. & I.?

"A. I might have done so; yes.

"Q. You said a moment ago that you knew the night yardmaster or somebody there at Wyoming yard called up to find out?

"A. Yes, sir.

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"*Q.* And that was the answer that you had given, was it, at that time, that No. 8—

"*A.* That was before the change; yes.

"*Q.* Before the change the last time?

"*A.* Yes.

"*Q.* Was that the answer that you had given?

"*A.* Yes, sir. * * *

"*Q.* Have you any way of knowing what time you got the order changing that arrangement of things; that is, about No. 8 not detouring?

"*A.* No. That was done by telephone with Mr. Quinlan (chief train dispatcher).

"*Q.* And so that the detouring matter, by Mr. Quinlan, was changed again, was it?

"*A.* Yes, sir.

"*Q.* And that was changed by telephone?

"*A.* Yes, sir; with Mr. Quinlan. * * *

"*Q.* Do you know why Mr. Quinlan changed the order there at that time to send the train out over the Pere Marquette?

"*A.* We received word from Mr. Long, I think it was—he was our engineer, civil engineer at that time—that the track, that the bridge would be so that we could go over it by a certain time, and it would be as well to run them that way to save time.

"*Q.* That was just before you sent No. 8 out that night, wasn't it?

"*A.* The last change; yes.

"*Q.* And that was just before No. 8 went out on the night of March 9th that you received those instructions?

"*A.* Yes; this last change.

"*Q.* How did that instruction come? Did that come by telegraph or telephone?

"*A.* Telephone from Mr. Quinlan. * * * We did not telephone out there that there had been any change. Mr. Quinlan is our chief dispatcher.

"*Q.* Now, he gave you instructions over the telephone to detour No. 8 over the G. R. & I.?

"*A.* Gave it to our office; yes.

"*Q.* And he also gave you instructions over the telephone to run your train over the Pere Marquette, No. 8?

"*A.* After the first change.

"*Q.* So he was giving you instructions as to what movement of passenger trains by telephone, was he?

"*A.* As to which way to run them; yes, sir."

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The switch tender at Sunny Side testified:

"Q. I understood you to say you received your orders as to how to handle your switch from the yard office at Wyoming yards?

"A. I did. There was no telegraph office at my station. I never received any 31 orders or 10 orders.

"Q. How did you receive your orders?

"A. Over the telephone.

"Q. Telephone from Wyoming yards?

"A. From Wyoming yards.

"Q. Now, the orders given you there at that station, what orders was it that you received there; I mean in regard to handling your switch and trains?

"A. In order to running the trains you mean?

"Q. Yes.

"A. They gave me the orders from there in case any specials or anything of that kind were out, outside of the regular trains, why, they gave me the orders on telephone, or any other order that they wanted me to handle.

"Q. You handled them by telephone from the Wyoming yard office?

"A. Yes, sir; no other way.

"Q. For instance, if with your information that you received you wanted to know whether a regular was late, did you get your instructions from Wyoming yards over the telephone?

"A. I did.

"Q. And as to whether a train was annulled?

"A. Yes, sir.

"Q. It came by telephone?

"A. Yes, sir.

"Q. I will ask whether you made those inquiries, or they were telephened out to you without inquiry?

"A. They were telephoned to me without.

"Q. If a regular train then was late, you received that instruction, did you, from the Wyoming yards office?

"A. Yes, sir.

"Q. Or, if it was annulled, you received that instruction from the Wyoming yard office?

"A. I did. * * *

"Q. As to your authority there at your station, what instructions did you receive as to letting trains through?

"A. Why, of course, outside of the regular train, I was instructed to use my own judgment in letting them through.

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"*Q.* In letting them through?

"*A.* Yes, sir.

"*Q.* Suppose, for instance, that you received an order that a train was an hour late, and an extra should approach your station from the east, would you let it through?

"*A.* I would; that is, up to a certain time of this hour.

"*Q.* That is up to the time of—

"*A.* Say 10 or 15 minutes.

"*Q.* Were those your instructions to let them through?

"*A.* They was.

"*Q.* So, if a train was annulled, was it your instructions to let the trains through then?

"*A.* It was. * * * The first day that they were detoured was the 6th of March, and they were detoured every day after that until the 9th. On the 6th I received my instructions that trains were going to detour over the G. R. & I. over the telephone from the yard.

"*Q.* Then did you act accordingly?

"*A.* I did.

"*Q.* Paid no further attention to the train?

"*A.* No, sir.

"*Q.* Did you receive each day after that a telephone order up to the 9th that they were going to detour the G. R. & I. tracks; that is, the regular train.

"*A.* No; not each night I didn't.

"*Q.* How did you know that they were going to detour there?

"*A.* I didn't know, only I depended on the yardmaster to let me know.

"*Q.* I know, but did the yardmaster let you know?

"*A.* When they gave me this telephone, they gave me that telephone as an order until further orders, you see.

"*Q.* Oh, until further orders?

"*A.* Yes, sir. I received a telephone message on the night that plaintiff was injured. Plaintiff arrived there from the east with his train at 11:35 p. m.

"*Q.* Did you handle the trains that came through there, let them in or stop them, according to the message that you received over the telephone from the yard office?

"*A.* I did. Mr. Jones arrived there about 20 minutes after I had received that information.

"*Q.* Do you remember how it was; did you make inquiry yourself, or were you told?

"*A.* They called me up and told me.

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"*Q.* Would they call you up on the same phone they called you, would they notify the Plaster Creek office, too?

"*A.* Any time like that they called us both, first one and then the other, so both switch tenders heard it together, so we understood it.

"*Q.* After receiving these orders, you did go on and handle the trains accordingly?

"*A.* Yes, sir.

"*Q.* As I understood you to say, that was your instructions to do so from the yardmaster?

"*A.* It was. It was Lawless gave me that instruction over the phone about 11:20 p. m.

"*Q.* Between the time that Mr. Lawless had informed you that No. 8 was going to detour over the G. R. & I., did you get any other order from the office that No. 8 was coming that way?

"*A.* I did not.

"*Q.* Would you be notified if a special was going to run, and would they give you the time of its running past your station?

"*A.* Yes, sir. If the order was canceled, they would notify me of that fact through the yard office by telephone.

"*Q.* And, as I understand you, it was your orders to act accordingly with the switches after receiving such an order?

"*A.* Yes, sir.

"*Q.* Now, did you have any instructions as to the time, after letting one train through, that you would let another through the switch following it?

"*A.* Yes, sir. I was not to let another train follow a regular within 10 minutes, but all extras or like that it didn't make any difference. * * *

"*Q.* When Mr. Jones arrived there at Sunny Side, what information did you give him, or what conversation did you have with him?

"*A.* I told him that I had order that No. 8 was going to detour over the G. R. & I. I told him to go ahead and gave him the switch. It was 11:35 p. m. when he passed through my switch to the south. * * * If No. 8 had been on time, she would have been due at my station about 11:32 p. m. That would be three minutes before Mr. Jones appeared there.

"*Q.* Would you have let Mr. Jones through there over that track, had you known they were going to send No. 8 down?

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"*A.* No, sir. I relied upon the instructions that they gave me that No. 8 was going to detour.

"*Q.* And, had you had any knowledge whatever that the dispatcher had changed his mind about that train, would you have let Jones through?

"*A.* No; I would not.

"*Q.* Did you know what train that was that was running; that is, No. 8 train that came down there, did you know what it was when it approached you?

"*A.* I did not.

"*Q.* Did you know what it was when it got through and past?

"*A.* I did not."

Charles Williams testified:

"*Q.* Now, Mr. Williams, you have not read any order concerning any detouring of any train on the 6th, 7th, 8th, or 9th. I will ask you if orders for detouring are made by the dispatcher of trains?

"*A.* Not for detouring; no.

"*Q.* I will ask you if detouring a train over the G. R. & I. annuls the train?

"*A.* No, sir. * * *

"*Q.* Suppose a railroad man were told that No. 8 was going over the G. R. & I., would that mean to a railroad man, under the rules, that there would be no train go over the Pere Marquette on the time of No. 8?

"*A.* Not necessarily; no, sir. As long as the schedule of No. 8 was not filled, they might run trains over their own tracks on the time of No. 8.

"*Q.* Suppose they should issue an order annulling No. 8, then that would be different, would it?

"*A.* That is a different thing entirely; yes, sir."

Plaintiff testified:

"I arrived at Sunny Side at 11:35. There was regular passenger train called No. 8 that was due to leave the Union Depot for Chicago at 11:30 p. m. A regular train is a train that runs on a schedule, on a time card.

"*Q.* And you say you arrived at Sunny Side at 11:35, five minutes afterwards?

"*A.* Yes, sir. * * *

"*Q.* When you arrived at Sunny Side, what did you do?

"*A.* I pulled down clear on the Y, clear of the Chicago

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Division, so that I was clear off and took the brakeman's lantern, and went down myself, personally, and asked the switch tender, Mr. Perry, how No. 8 was, and he says, 'Highball.' He says: 'No. 8 is going to detour over G. R. & I. Go ahead, the track is all your own.' * * *

"*Q.* Well, now after he had instructed you to go ahead, the track was yours, what did you do then?

"*A.* I went back to my engine and proceeded on to Wyoming yards, and, on approaching Plaster Creek, I called for that crossing there to get into the yard, and they would not give it to me. I called for the crossing with three whistles. That was the call that would let me into the north lead of Plaster Creek. They would not give me the crossing there to go into the yards. The switch tender gave me a motion with his lantern to go ahead, and I pulled down to the switch tender's station, and had a conversation with him. He said: 'Pull down to the south end of the yard and back in. The yard is blocked.'

"*Q.* That is, the lead was blocked?

"*A.* The north into the yard were blocked.

"*Q.* Then you understood the lead was clear, but the switches blocked?

"*A.* Yes, sir.

"*Q.* Then what?

"*A.* I pulled down to the south end of the yard over the south lead switch, and they throwed or turned the switch for me to turn my train in.

"*Q.* Do you know who did that?

"*A.* The brakeman, I think.

"*Q.* Now at that point, did you back your train there?

"*A.* Yes, sir.

"*Q.* At that point did you have any conversation with any one?

"*A.* Yes, sir.

"*Q.* Who was it?

"*A.* Dan Lawless, the yardmaster.

"*Q.* What was the conversation you had with him?

"*A.* He stood at the switch when the engine went by the switch, and I hollered to him, and asked him what the other lead was.

"*Q.* What do you mean by lead?

"*A.* I was on one lead, and there was another lead running in, running parallel with the lead I was already on.

"*Q.* What did he say?

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"*A.* He said: 'You had better come down the main.' He said: 'If you come down that lead, you will have lots of switches to throw, and it will be blocked with cars.'"

Defendant's traveling engineer testified:

"*Q.* Now, then, if the yardmaster had conveyed this notice to the Sunny Side switch tender that No. 8 was going to detour over the G. R. & I., did he have any right to rely upon that notice?

"*A.* He had the yardmaster's word that it was going to detour, and I suppose should rely upon it.

"*Q.* And in fact he should, shouldn't he?

"*A.* Yes, sir."

The train dispatcher was invested with the entire power of the company in moving trains, and it is a fair inference from the testimony that the train dispatcher understood that the yardmaster was making inquiries as to train No. 8 for the purpose of ascertaining whether he might use the main tracks through the yard without reference to that train. These inquiries were made just before or just after the leaving time of train No. 8, and the care of the yardmaster and the importance he attached to the information requested is shown by the fact that he did not rest upon the statement of his clerk, but called up the train dispatcher himself. When the train dispatcher informed him that train No. 8 would not come through the yard at all but would detour over the Grand Rapids & Indiana, he had a right to rely upon this statement and did rely upon it, and communicated the information in the customary manner to the switch tenders, and the switch tenders acted upon this information communicated in the customary manner, as was their duty. And the plaintiff, when informed by the yardmaster, through the switch tender, that the train would not pass through the yards that night, had a right to rely upon such information.

The question is not whether the trainmaster's information was given in a particular form, but Was it such as a reasonably prudent man might rely upon as stating a fact? The train dispatcher himself acted upon a tele-

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phonic communication from the chief train dispatcher, and he manifestly expected that the yardmaster should act upon the telephone message from him. According to the testimony of the train dispatcher, no formal orders were made for the detouring of trains; and neither were there any formal orders as to the lateness of trains, but, as appears from the testimony hereinbefore quoted, such information was communicated customarily over the telephone, and was manifestly so communicated, with the expectation that it would be acted upon as true. It is not a sufficient answer to say that the train dispatcher had a right to rely upon an observance of the rules by the trainmen so far as train No. 8 was concerned. He had expressly notified them that they might disregard that train, and could not have relied upon their observance of any rules to protect themselves against that train. He must be held to have known that the men would rely upon a statement coming from him, the supreme power in the movement of trains, that train No. 8 would not go through the yard that night, but would detour just as it had been doing for several days. The negligence of the plaintiff, in my opinion, should be determined with reference to the situation which confronted him, and not merely with reference to arbitrary rules. So considered, his contributory negligence was at least a question for the jury. The whole question, in my view, is whether the plaintiff had a right to rely upon the information given him in the customary way; and, if he did, then he was under no obligation to protect himself against train No. 8 at all. The record fairly discloses, I think, that the plaintiff had a right to rely upon the information given him as to train No. 8, or, at least, that it was not negligence *per se* to rely upon it.

It is said, however, that, since train No. 8 was not formally annulled, other trains might be sent through the yard on No. 8's time, and that plaintiff was chargeable with notice that he might meet an extra at any moment, and therefore was guilty of negligence in using the south-

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bound main track in backing north. Assuming that it would be negligence in the abstract for the plaintiff to back north upon the south-bound main, and that plaintiff would have been guilty as a matter of law of contributory negligence in case of collision with any other train running on No. 8's time, it does not necessarily follow that he was guilty of contributory negligence in this case. If, so far as the train which collided with his engine was concerned, it was not actual negligence for him to use the particular track, his cause of action was not lost because of hypothetical occurrences which might have convicted him of negligence.

The trial court, however, did not take this view, but adopted the defendant's view, and instructed the jury that plaintiff was guilty of contributory negligence, unless observance of the bulletin had been waived by the defendant, which question he submitted to the jury. In my opinion the testimony in the case, and particularly that given by plaintiff, Albert Palmer, and John Bays, warranted the court in submitting to the jury the question of the abrogation of the bulletin as to the track to be used under such circumstances as existed in this case. I think the court sufficiently corrected such errors as were committed in receiving opinion evidence as to the construction of rules and bulletins, so that there was no prejudicial error.

No request for a ruling appears to have been insisted upon as to the improper argument of counsel, and such argument is not, therefore, properly before us for consideration.

In my opinion the judgment should be affirmed.

MOORE, J., concurred with BLAIR, J.

BIRD, J., did not sit.

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CONNOR v. LAKE SHORE & MICHIGAN SOUTHERN RAILWAY CO.

1. ESTOPPEL — JUDICIAL ADMISSIONS — STIPULATIONS — ATTORNEY AND CLIENT.

   On the trial of an action for personal injuries, plaintiff's counsel admitted in open court that a turntable, at which plaintiff was employed turning an engine, could be revolved freely in either direction. The appellate court on error held that if he could have turned the table in the opposite direction the danger complained of could not have caused his injury and he should have selected the safer method. *Held*, that plaintiff was estopped on the second trial from taking the inconsistent position that the turntable could be revolved only in the direction in which he and his fellow-servants were causing it to move.

2. SAME.

   Judicial admissions stand upon a different footing from testimony and are conclusive, even upon a new trial. MOORE and BLAIR, JJ., dissenting.

Error to Lenawee; O'Mealey, J. Submitted June 23, 1911. (Docket No. 69.) Reargued October 13, 1911. Decided December 29, 1911.

Case by Thomas G. Connor against the Lake Shore & Michigan Southern Railway Company for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Smith, Baldwin & Alexander, for appellant.

Herbert R. Clark, for appellee.

This case was before the court at the October, 1909, term, and will be found reported in 158 Mich. 688 (123 N. W. 533). The facts are there set out with sufficient clearness. Upon a second trial, the plaintiff desired to be permitted to withdraw the concession made at the first trial

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(to which reference is made at page 694 of 158 Mich. [123 N. W. 533]), and offered to show that on the night in question the turntable with engine No. 50 upon it, not only could not be turned with equal facility in either direction, but that it was absolutely impossible to turn it except in the direction in which it was moving at the time plaintiff received his injury. Counsel for plaintiff further offered to testify that in making the concession which he did upon the former trial he acted under a misapprehension as to the scope of the inquiry made by defendant's counsel, and intended only to admit that as a general proposition the turntable would move with equal facility in either direction, but did not intend to admit that it would so move at the time plaintiff was injured. Counsel for defendant objected, and insisted that to allow plaintiff to give testimony in accordance with the offer would be to permit him to entirely change the theory upon which the case was originally tried, and found to be untenable, and to adopt a theory as to a controlling fact wholly at variance with, and antagonistic to, the one at first relied upon. Counsel for plaintiff urged that there was no change of theory—that the record upon the first trial contained evidence tending to show that upon the occasion in question the table could be turned only in one direction, and it was plaintiff's desire at this trial simply to amplify the evidence upon this point. The trial court, after an extended argument, granted the motion of defendant for a directed verdict, and plaintiff has removed the case to this court for review.

BROOKE, J. (*after stating the facts*). Since the argument of this case we have again carefully examined the record presented to the court upon the former hearing. We find that plaintiff testified that engine No. 50, which caused his injury, was one of the lighter type of engines in use by the defendant company at that time. He said:

"Engine 50 wouldn't project over the sides any. It was a small engine. * * * On a small engine like 50

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I think there would be about a foot between the engine and the push bar."

As to what was done upon the occasion in question, he testified:

"When I got out there that night, * * * if I recollect right, the engine was stuck so that you could not move it, and we moved it back to the south a ways to get a kind of run on it. It was necessary most of the time to get speed on it, * * * and it was necessary to put speed on. We would move it as fast as we could, and that would help it over these bad places."

He further testified:

"When I first took hold of the lever, I think we started north with the engine. We turned them usually any way that we could—sometimes one way and sometimes the other. We would go sometimes as far as we could and stop, and then turn and go the other way as far as we could."

Frank Beyer, a witness for plaintiff on the former trial, testified, in part, as follows:

"*Q.* Well, now, you were standing then, or when you went out there, the engine was standing in sort of that condition (indicating)?
"*A.* Yes, sir.
"*Q.* Is that right?
"*A.* Yes, sir.
"*Q.* And was it stuck there?
"*A.* Yes, sir.
"*Q.* Well, what did you do first when you found the engine in that condition, stuck? Now you just tell the jury what you did.
"*A.* Why, I think Mr. Rogers and his helper, whoever it was, got a bar and got it off from that place where it stuck. Of course, they moved it back you see, and—
"*Q.* Well, now, what did they do? Did they get on this side of the—get down on the east side of the table and pinch it back south?
"*A.* Yes, sir; on the north side.
"*Q.* On the north side?
"*A.* Yes; and pushed it toward the south.
"*Q.* And got it off from this—
"*A.* Why, the place where it was stuck.

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"*Q.* Well, then, after you got it off from that, what did you do?

"*A.* Well, then, we got a new hold on it, and tried it again.

"*Q.* And that is the time Mr. Connor got hurt?

"*A.* Yes, sir."

The engine was traveling in a northerly direction when plaintiff was hurt. We think the foregoing testimony clearly indicates that, while attempting to turn the engine to the north, it had become "stuck," that thereupon it was turned a little way to the south "to get speed on it," and then pushed as rapidly as possible towards the north. We have been unable to discover a single word of testimony in the former record from which an inference could be drawn that the engine stuck while being moved to the south, and therefore could not be further turned in that direction. We have not adverted to the testimony introduced on behalf of the defendant upon this point. We think that the testimony above quoted, together with the concession made by plaintiff's counsel, clearly establishes the fact that upon the occasion in question the table would turn with equal facility in either direction. In our former opinion we held (and, after a reperusal of the record, we still think properly) that fact to be controlling of the issue.

The question, then, is presented, whether plaintiff should now be permitted to introduce testimony tending to establish the exact converse of that fact. We are constrained to hold that he may not do so. In *Hamilton* v. *Frothingham*, 71 Mich. 616 (40 N. W. 15), this court said:

"Even if this were not so, the plaintiff cannot be permitted to take a position now wholly inconsistent with that taken on the former trials. The contract now claimed under is wholly inconsistent with that claimed upon the former trials. If this contract was made, then the one upon which the former recovery was had did not exist, and no recovery could have been had thereunder. If the contract was to pay all over $8,000, then an express contract to pay a certain and specific sum did not exist.

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"If such inconsistent positions were allowed to be taken in courts of justice, there would be no end to litigation. Parties finding that contracts upon which they have relied for recovery cannot be upheld in the courts are not permitted under the same pleadings and bills of particulars to retry their case upon an entirely different contract, and one entirely contradictory to the one first claimed under, even for the purpose of meeting the opinion of this court and squaring their case with it."

Again in *Humphrey* v. *Transportation Co.*, 115 Mich. 420 (73 N. W. 422), it is said:

"It is well settled that a plaintiff cannot maintain inconsistent positions; that is, he cannot commence and prosecute a suit upon one theory, and then abandon that theory and adopt another entirely inconsistent with the first, when the assertion of the latter would positively negative the former."

In *Marquette, etc., R. Co.* v. *Marcott*, 41 Mich. 433 (2 N. W. 795), Mr. Justice GRAVES, speaking for the court, said:

"The court must consider that the concession was in fact made as represented in the bill of exceptions, and as a consequence must hold that the plaintiff in error is not entitled to take any ground inconsistent with it.

"After submitting to the jury to have the case go one way or the other as they should find on consideration of the evidence that the company was or was not negligent in the particular respects charged, it is not competent to assume a discrepant position or claim to have been injured by rulings only bearing on points which the concession put out of controversy."

See, also, *Wetmore* v. *McDougall*, 32 Mich. 276; *Henry* v. *Quackenbush*, 48 Mich. 415 (12 N. W. 634); *Bassett* v. *Shepardson*, 57 Mich. 428 (24 N. W. 182).

The case of *Pelton* v. *Schmidt*, 104 Mich. 345 (62 N. W. 552, 53 Am. St. Rep. 462), relied upon by plaintiff, has been examined with care. In that case the plaintiff upon the first trial testified that he had never been in the store from that way before the occasion of his injury. Upon the second trial he testified that it was his custom to

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go through to the clerk to get receipts, entering at the back door. Commenting upon this change in plaintiff's testimony, Mr. Justice HOOKER says:

"Defendants' counsel contend that the plaintiff is concluded by his former testimony, and that he should not be allowed to recover by reason of evidence flatly contradictory of his former testimony. Decisions of this court in cases brought here by writ of error are conclusive upon the parties, as far as the law is concerned, whenever the same state of facts is presented; but upon different facts other principles may apply. If parties change their testimony, the jury may properly consider the fact, but it is not for this court to say that a party must stand or fall by his former testimony, where there is any legitimate opportunity for a change in the testimony. It may, perhaps, be said that there was no such opportunity here; but, by ordering a new trial, this court relegated the subject to the jury."

It may be said that this case is not in harmony with earlier decisions of this court. It is not necessary so to determine here. Admissions stand upon a different footing from that held by mere testimony. The jury hears the testimony, weighs it, and believes it or not, as the case may be, but a judicial admission made intelligently and with deliberation establishes the fact with reference to which it is made, and the jury must accept it as so established. 1 Greenleaf on Evidence, § 186, states the rule as follows:

"The admissions of attorneys of record bind their clients, in all matters relating to the progress and trial of the cause. But, to this end, they must be distinct and formal, or such as are termed solemn admissions, made for the express purpose of alleviating the stringency of some rule of practice, or of dispensing with the formal proof of some fact at the trial. In such cases, they are in general conclusive, and may be given in evidence, even upon a new trial"—citing cases.

See, also, 2 Chamberlayne on Evidence, § 1232 *et seq.*; 4 Wigmore on Evidence, § 2588 *et seq.*, and cases cited.

In the case at bar the defendant was offering evidence

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to the effect that the table would turn as well one way as the other when the admission was made, thus doing away with the necessity for such evidence. It is possible that evidence available at the former trial upon this point might not be available at a subsequent hearing. In such case defendant, in accepting the admission in place of putting in the testimony, would be placed at a distinct disadvantage, if, upon a second trial, plaintiff were permitted to withdraw his admission and offer evidence at variance therewith.

We are of opinion that the learned circuit judge made a proper disposition of the case.

The judgment is affirmed.

OSTRANDER, C. J., and STEERE, MCALVAY, and STONE, JJ., concurred with BROOKE, J.

MOORE, J. (*dissenting*). I cannot agree with the conclusion reached by Mr. Justice BROOKE. It should not be forgotten that the result reached by this court is to be visited, not upon the lawyers employed in this case, but upon the parties to the litigation.

The record discloses that one of the counsel for plaintiff did not participate in the former trial until it had been in progress for a day or two. At about the time he began to participate in the trial, the question was put to a witness which led to what is now claimed to be an admission of so solemn a character as to preclude the plaintiff from showing the actual fact in relation to a material matter. Counsel both say they understood the question and the admission very differently from the interpretation given it by counsel for the defendant, and by the court upon the second trial.

We quote from the record:

"*Mr. Baldwin:* I want to say here that, at the time of the claimed admissions that were made in reference to how this table was turned, I had no apprehension that those questions and those inquiries were directed at the engine in question and at the time in question, because

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Mr. Clark's question didn't point to this engine, or didn't point to the time in question when Mr. Connor was hurt, but his question was whether they sometimes turned engines one way and another upon that table, and it misled me to believe that his inquiry was directed to the movement of that table generally. Now, that was the situation.

"*Mr. Smith:* And that we want to show, too.

"*The Court:* What other engine was under investigation on that turntable, except this one, at the time?

"*Mr. Baldwin:* There was none, and, if he had simply said to me, or asked that question, directed his question to that engine, there wouldn't have been any difficulty in this lawsuit, but he didn't do it. He asked the question if they couldn't turn engines generally both ways on that table, as the question itself shows from the record, and it misled me because I didn't think that he meant the engine in question. If he had meant that he would have said: 'Is it true that engine No. 50 could be moved either way upon this table?' But instead of doing that, and instead of applying to the case that was then being tried, he said: 'Have you moved engines both ways upon this table?' And that is what misled me, because that was true that they did move engines, some engines would move both ways, and some engines wouldn't."

Counsel are reputable practitioners of high character, and we have no doubt mean to state truly their understanding of the question and of the admission. If they do, then we think it cannot be said that they were so "distinct and formal of such as are termed solemn admissions made for the express purpose of alleviating the stringency of some rule of practice," etc., within the meaning of the authorities cited by Justice BROOKE. We think what was said and done in the course of the other trial ought not to preclude the plaintiff from showing, if he can, the actual situation at the time his cause of action, if any, arose. I cannot distinguish the case in principle from *Pelton* v. *Schmidt*, 104 Mich. 345 (62 N. W. 552, 53 Am. St. Rep. 462), where Justice HOOKER, speaking for the court, said:

"Defendants' counsel contend that the plaintiff is concluded by his former testimony, and that he should not be

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allowed to recover by reason of evidence flatly contradictory of his former testimony. Decisions of this court in cases brought here by writ of error are conclusive upon the parties, so far as the law is concerned, whenever the same state of facts is presented; but upon different facts other principles may apply. If parties change their testimony, the jury may properly consider the fact; but it is not for this court to say that a party must stand or fall by his former testimony, where there is any legitimate opportunity for a change in the testimony. It may, perhaps, be said that there was no such opportunity here, but by ordering a new trial this court relegated the subject to the jury."

If I am right about this, it follows that the case should be reversed, and a new trial ordered.

BLAIR, J. If the previous decisions of this court are opposed to the result reached by Justice MOORE, I think they should not be followed, and I therefore concur in his opinion.

BIRD, J., did not sit.

GUNTERMANN v. MICHIGAN CENTRAL RAILROAD CO.

RAILROADS—CROSSING NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

The failure of the driver of a vehicle to hear the audible rumble of a fast train, hear its bell, or whistle, or to see a brilliantly lighted train, with a headlight burning, visible 870 feet away at a point 56½ feet from the track, 530 feet away at a point 46½ feet from the track, and 1,500 feet away at a point 26½ feet from the track, was contributory negligence, in the absence of evidence that he stopped, looked, and listened before crossing the right of way.[1]

[1] For various phases of question of duty to stop, look, and listen before crossing railroad tracks, see notes in 6 L. R. A. (N. S.) 150; 17 L. R. A. (N. S.) 505; 21 L. R A. (N. S.) 309.

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Error to Bay; Collins, J. Submitted February 17, 1911. (Docket No. 92.) Resubmitted October 5, 1911. Decided December 29, 1911.

Case by Mary A. Guntermann, administratrix of the estate of John W. F. Guntermann, deceased, against the Michigan Central Railroad Company for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Cooley & Hewitt (*Humphrey, Grant & Baker*, of counsel), for appellant.

De Vere Hall, for appellee.

BROOKE, J. This is an action brought by Mary Guntermann, the widow and administratrix, for damages claimed to have accrued against the Michigan Central Railway Company for causing her husband's death. John W. F. Guntermann was killed on September 1, 1908, at the Chestnut street crossing of said railroad, in the city of Bay City, Mich. The plaintiff recovered a verdict on which judgment was duly entered for the sum of $5,975, and the case is brought into this court by writ of error.

Chestnut avenue runs east from Chilson avenue to Wenona avenue, crossing Erie avenue at right angles and about midway between Chilson avenue and Wenona avenue. At the intersection of Chestnut avenue and Erie avenue the defendant road crosses these streets. The tracks run diagonally east of north and west of south. Mr. Guntermann was in a laundry wagon, going east on Chestnut avenue, when his wagon was struck by a northbound train. He received injuries from which he died in about five hours. The boy who was with him was also killed. It was the claim of plaintiff that the train was going 35 or 40 miles an hour; while the engineer and fireman testified it was going 15 or 20 miles an hour on a down grade with the steam shut off—drifting, as one of the witnesses called it.

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Counsel are agreed that the only questions submitted to the jury were:

First. Was the defendant guilty of negligence in running its train across Chestnut street crossing at the time of the accident, at a speed faster than permitted by the ordinance of Bay City.

Second. Was the defendant guilty of neglect in failing to provide a crossing sign as required by statute at the Chestnut street crossing of the Michigan Central Railroad.

Third. Has the plaintiff satisfied the jury by the evidence in this case that on the night in question, at the time of the happening of the accident, the decedent was not guilty of any negligence in approaching this crossing, which contributed to the injury causing his death.

Counsel for plaintiff insists that each of these questions was properly submitted, while counsel for defendant, with equal emphasis, insists they were improperly submitted, and that a verdict should have been directed for defendant. We find it necessary to consider the third question only.

The following facts are undisputed: For more than nine years plaintiff's decedent had lived within one-half mile of the crossing upon which he met his death. The crossing was a level one; the defendant's track being elevated about one foot above the street level. Decedent had crossed at this crossing going in the opposite direction within 20 minutes of the time he attempted to cross when he was killed. It was a very dark night. The engine which caused decedent's death was equipped with a powerful headlight, which was lighted, and it was hauling a passenger train also brilliantly lighted. The rumble of the approaching train could be heard several blocks away. At a distance of 56½ feet from defendant's track, decedent had an unobstructed view of the approaching train for a distance of 370 feet. At a distance of 46½ feet his view was unobstructed for 530 feet, and at a distance of 26½ feet from the track he could have seen the approaching train 1,500 feet away. The engine whistle had been

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blown for the crossing. The bell upon the engine was ringing. There is no testimony that upon approaching the track plaintiff's decedent stopped, looked, and listened for the approaching train. Under the facts disclosed, the presumption that decedent acted with due care is swept away, and he should be charged with such negligence as would preclude recovery by the plaintiff. Assuming that the horse was traveling at the rate of 4 miles per hour, and the train at 40 miles per hour, when decedent was 30 feet from the track, the train was but 300 feet away, approaching with its headlight burning, and its engine bell ringing. A verdict should have been directed for defendant under the following authorities: *Mynning* v. *Railroad Co.*, 64 Mich. 93 (31 N. W. 147, 8 Am. St. Rep. 804); *Freeman* v. *Railway Co.*, 74 Mich. 86 (41 N. W. 872, 3 L. R. A. 594); *Underhill* v. *Railway Co.*, 81 Mich. 43 (45 N. W. 508); *Apsey* v. *Railroad Co.*, 83 Mich. 432, 439, 440 (47 N. W. 319); *Grostick* v. *Railroad Co.*, 90 Mich. 594 (51 N. W. 667); *Shufelt* v. *Railroad Co.*, 96 Mich. 327 (55 N. W. 1013); *Gardner* v. *Railroad Co.*, 97 Mich. 240 (56 N. W. 603); *Phillips* v. *Railroad Co.*, 111 Mich. 274 (69 N. W. 496, 66 Am. St. Rep. 392); *Stewart* v. *Railroad Co.*, 119 Mich. 91 (77 N. W. 643); *Britton* v. *Railroad Co.*, 122 Mich. 359, 362 (81 N. W. 253); *Hampel* v. *Railroad Co.*, 138 Mich. 1, 3 (100 N. W. 1002, 110 Am. St. Rep. 275); *Strong* v. *Railway Co.*, 156 Mich. 66 (120 N. W. 683).

The judgment is reversed, and a new trial will be granted.

OSTRANDER, C. J., and STEERE, MOORE, MCALVAY, BLAIR, and STONE, JJ., concurred.

BIRD, J., did not sit.

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GRAHAM v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. MASTER AND SERVANT—RAILROADS — NEGLIGENCE — DEFECTIVE ROADBED.

   Whether defendant, a railroad company, was negligent in failing to cause a train order to be delivered notifying the crew of a construction and repair train of a washout on its right of way, on the theory that the train dispatcher sent an ordinary message to the operator at Corunna, without requiring the customary evidence of its delivery, as in case of a train order, and such was not a proper method of communicating the information, was rightly submitted to the jury.

2. SAME—EVIDENCE—EXPERT TESTIMONY.

   The opinion of a train dispatcher that the method adopted was a proper method was correctly excluded from the evidence. BROOKE, J., dissenting.

Error to Clinton; Searl, J. Submitted December 1, 1910. (Docket No. 100.) Resubmitted October 5, 1911. Decided December 29, 1911.

Case by Rose E. Graham, administratrix of the estate of Justin E. Graham, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company for the negligent killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Affirmed.

Harrison Geer, for appellant.

Lyon & Moinet, for appellee.

MCALVAY, J. This is the second time this case has been before this court. A judgment which was rendered upon the first trial was reversed and a new trial granted. The case is reported as *Graham* v. *Railway Co.*, 151 Mich. 629 (115 N. W. 993, 25 L. R. A. [N. S.] 326). The statement of facts in that opinion requires no enlargement, and may be considered as the statement of facts for the purposes of the present presentation. In order

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to understand the facts properly, and to know what was determined in the case by this court, a careful reading of the entire opinion will be necessary before reading this opinion.

It will appear from that opinion that the breach of duty relied upon and charged by the plaintiff was the neglect to notify the conductor, engineer, and plaintiff's intestate of the condition of the track caused by the washout, of which defendant had notice, and counsel for plaintiff insisted on that hearing that such "duty resting upon the defendant to notify either plaintiff's intestate or the trainmen of the known condition of the road was a positive duty." The case has been retried, and defendant has again brought it to this court for review upon writ of error. The record now presented, with but slight variations, is the same as that before the court on the former hearing.

On the former trial, the jury, in answer to special questions submitted by the court, at the request of plaintiff, found that the disputed message was not sent from Durand to Corunna, and that it was not delivered to the engineer or the conductor. The court also charged that the telegraph operator at Corunna was not a fellow-servant of plaintiff's intestate. Defendant insisted that a verdict should have been instructed in its behalf because no negligence had been shown, and that the negligence, if any appeared, was the negligence of the telegraph operator at Corunna, a fellow-servant of plaintiff's intestate. Two opinions were filed by the justices who heard the case. The court was unanimous in reversing the judgment and granting a new trial, also in holding that the undisputed evidence showed that the telegram was sent by the train dispatcher from Durand to Corunna, whereby he undertook to acquaint the trainmen of the known conditions of unsafety, and also upon the proposition that, because the telegraph operator and the trainmen were fellow-servants, the operator's negligence could not be charged to defendant.

Whatever difference of opinion was entertained by the members of the court who sat in the case appears in the following excerpts:

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Mr. Justice OSTRANDER, speaking for himself and two justices who concurred with him, said:

"Whether the message was sent, and whether it was delivered, are separate and distinct questions. Circumstances which justified the finding that the message was not delivered to the trainmen did not justify a finding that it was not sent by the train dispatcher. We have, therefore, after a careful examination of the record, reached the conclusion that the finding of the jury that the message in question was not sent is unsupported by evidence. This requires us to reverse the judgment, and to order a new trial, for the reason that the jury should have been instructed that, if they found that the train dispatcher at Durand made proper effort to acquaint the trainmen with known conditions of unsafety, defendant had performed its duty in the premises. There is considerable testimony tending to prove that less care is generally observed to insure the delivery of messages than is used to insure the delivery of train orders. Evidence of the delivery of train orders is secured at the central or directing office before trains are cleared. Such orders are, in effect, receipted for by the trainmen or by the conductor of the train. Defendant was bound to use a degree of care commensurate with the importance of the communication and the purpose for sending it, not only in transmitting the message, but in securing its delivery to the proper persons. But we are not prepared to hold that in the performance of that duty it had not the right to rely reasonably upon its servants, agents, and means of communication, or to use other means of communication if its own were defective. * *
* The duty of the master to minimize danger by giving notice of the places where defects existed has been stated. If in performing this duty, by the use of means adequate to impart the knowledge to the proper persons in proper season, the purpose was defeated by negligence of the station agent, which due care on the part of the master would not have prevented or discovered, defendant is not responsible for the consequences. We intimated this principle in *Moon* v. *Railroad Co.*, 143 Mich. 125, 135 (106 N. W. 715, 108 N. W. 78). It requires a high degree of care, but does not extend so far as to impose a positive and wholly nondelegable duty upon the master."

The opinion written by Mr. Justice CARPENTER, concurred in by Chief Justice GRANT, is as follows:

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"I agree with Justice OSTRANDER that, if 'the train dispatcher at Durand made proper effort to acquaint the trainmen with the known conditions of unsafety, defendant had performed its duty in the premises.' I agree with him that the undisputed testimony proves that said train dispatcher did undertake to acquaint the trainmen of such conditions of unsafety by telegraphing the conductor and engineer of said train at Corunna. I think by sending this telegram the train dispatcher adopted the obviously proper method of acquainting the trainmen with those conditions. It was a method, too, which would have been entirely sufficient had not the station agent (operator) at Corunna failed to perform his duty. The train dispatcher had a right to assume, and to act upon that assumption, that there would be no failure to perform that duty. Under these circumstances, I can perceive no sound reason for saying that something else should have been done, or that what was done should have been done in any different manner. I am of the opinion, therefore,—and here is where I go further than does my Brother OSTRANDER,—that we should say under the circumstances disclosed by the record that in sending the telegram to Corunna, the train dispatcher performed his entire duty—and the entire duty of defendant toward plaintiff's intestate. It follows that in my judgment defendant was entitled to a directed verdict. I agree with Justice OSTRANDER that the judgment should be reversed and a new trial granted."

There is therefore but one important question left in the case for determination, and that is: Was there any question of negligence of the defendant to be submitted to the jury? All other questions of importance were settled by the former decision of this court. This was left an open question. It is clearly indicated in the opinion written by Mr. Justice OSTRANDER that this was a question of fact to go to the jury. That it is a close question must be admitted. It was not concurred in by a majority of the court and was therefore not conclusive upon this court. The question as to whether the message was delivered we think will be conceded to have been a question of fact for the jury, which has been found in favor of plaintiff. Its nondelivery by reason of negligence of the operator is eliminated from the case. The testimony in the case rel-

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ative to the degree of care generally observed to insure the delivery of messages and train orders does not differ in any respect from that contained in the former record which was considered in the opinion. The case, that opinion states, was reversed—

"For the reason that the jury should have been instructed that, if they found that the train dispatcher at Durand made proper effort to acquaint the trainmen with known conditions of unsafety, defendant had performed its duty in the premises. * * * Defendant was bound to use a degree of care commensurate with the importance of the communication and the purpose for sending it, not only in transmitting the message, but in securing its delivery to the proper persons."

To be consistent with this opinion, it must be held that this question was properly submitted to the jury. The communication was a most important one. It is still a fact, as stated in the former opinion, that—

"There is considerable testimony tending to prove that less care is generally observed to insure the delivery of messages than is used to insure the delivery of train orders."

The record shows that of all the orders communicated to these trainmen that day this one only was by a message. The others were train orders, and were all delivered to the proper persons. The finding of the jury was supported by the evidence.

Error is assigned upon the refusal of the court to admit testimony of expert witnesses to show that sending the communication by telegraph message as in this case was good railroading. An examination of the former opinions in the case discloses the precise question of fact left for the jury to determine. The testimony offered was not material to its solution. It was properly excluded.

The judgment is affirmed.

BLAIR and STONE, JJ., concurred with MCALVAY, J.

OSTRANDER, C. J. (*concurring*). We agreed, when this cause was here before, that whether defendant was negligent in the premises depended upon whether the

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train dispatcher made proper effort to acquaint the trainmen with known conditions of unsafety. We agreed that the testimony required the finding that the dispatcher sent to the trainmen at Corunna notice of these conditions in a message addressed to the conductor and engineer in charge of the train, and that the train was stopped at Corunna for the purpose of delivering the message. We agreed that whether it was delivered to the trainmen, or to either of them, and whether the information afforded thereby came to the knowledge of either, was a disputed question of fact. Two of the justices were of opinion that the answer to this question was unimportant as affecting the liability of defendant to the plaintiff, for the reason that the dispatcher had the right to rely upon a proper delivery of the message—on due performance of duty by the station agent at Corunna who received the message. Three of the justices were unwilling then to say, as matter of law, whether some further evidence of the delivery of the message should or should not have been secured by the dispatcher, in view of the importance of the communication, the nature of the known conditions revealed in the message, and the custom and habit of the defendant to secure such further evidence when orders controlling the running of trains were given.. This question, namely, whether this train should have been permitted to proceed without securing evidence in the dispatcher's office that the message had reached the trainmen, is again presented, and is the controlling question.

The jury has again found that the message was not delivered to the conductor or engineer, and that neither of them had notice or knowledge of its contents. It is controlling because it is the claim of defendant that the movements of the train were directed by the conductor and controlled immediately by the engineer, and that to these men in the discharge of its duty it sought to convey seasonable notice of the defects in the roadbed. The purpose of such a notice to them was obviously to protect them and the men and property in their charge—to govern, to that extent,

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the operation of the train. I find no evidence of an express rule or controlling custom of the defendant in like cases. It does appear that, to secure the release of a train stopped for orders, it is the rule and custom to obtain evidence that the orders have actually been received by the trainmen. I am not prepared to say that the information contained in the message in question, admittedly intended for the trainmen, was of smaller importance in kind than that conveyed by train orders. And I do not see how the testimony of railroad men to the effect that the method pursued was a proper method could have afforded the jury any real basis for determining the precise question which is involved. Courts should be and are disinclined to criticise, or to permit juries to disregard, rules adopted for conducting private business which have been approved by experience and followed with safety. In the case at bar it appears that defendant customarily, and according to approved rules, secured evidence of the delivery of train orders to those to whom they were given before permitting trains to be moved. They sent certain information customarily by messages, securing no such evidence of delivery. It would seem that the matter of the communication, and not what a dispatcher called it, should control the method of dispatching and delivery. I think it was for the jury to determine whether, in view of all the testimony, including the rules of defendant, it had used even ordinary care to insure to the trainmen notice of the perils of a perilous journey.

I concur in affirming the judgment.

STEERE and MOORE, JJ., concurred with OSTRANDER, C. J.

BROOKE, J. (*dissenting*). As I read the opinions delivered when this case was before the court on another occasion, but one question of fact was left for the determination of the jury. That question is whether the defendant made proper effort to acquaint the engineer and conductor of engine extra 1104, with the dangerous condi-

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tion of the track. It is settled in this trial, as it was in the former, that the message (Exhibit 1) was sent by defendant's dispatcher, Crouch, to Humphrey, the agent at Corunna. It is likewise undisputed that the message was received by Humphrey before the arrival of the special at Corunna. The conductor denies all knowledge of the message, and the engineer is dead. The jury having found (whether against the weight of the evidence or not need not be determined) that the message was not in fact delivered to either the conductor or engineer, the question still remains as to whether or not the defendant used due care to secure its delivery.

As I view the matter, the inquiry narrows itself down to ascertaining whether it was in accordance with proper railroading to convey the information by means of a message, which was done, or whether, in the exercise of due care, defendant should have conveyed the information to the crew of the special in the form of an order. This question is, I think, clearly one upon which men of ordinary information are incapable of forming a reliable judgment. It is one which peculiarly calls for the expert opinion of those who by reason of their skill and experience in railroading are qualified to speak.

Defendant offered such testimony which was (I think erroneously) excluded. *Grand Rapids, etc., R. Co.* v. *Huntley*, 38 Mich. 537 (31 Am. Rep. 321); *Coburn* v. *Booming Co.*, 72 Mich. 134 (40 N. W. 198); *Underwood* v. *A. W. Stevens Co.*, 149 Mich. 39 (112 N. W. 487). I am of the opinion, too, that the court erred in excluding evidence on the part of the defendant of its custom in conveying information of the character of Exhibit 1. *Whalen* v. *Railroad Co.*, 114 Mich. 512 (72 N. W. 323); *Carr* v. *Tunnel Co.*, 131 Mich. 592 (92 N. W. 110); *La Barre* v. *Railway Co.*, 133 Mich. 192 (94 N. W. 735).

The judgment should be reversed, and a new trial ordered.

BIRD, J., did not sit.

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DUCRE v. SPARROW-KROLL LUMBER CO.

1. PRINCIPAL AND AGENT — MASTER AND SERVANT — TORTS OF AGENT—SCOPE OF AUTHORITY.
   An employer is not liable for wilful and malicious acts of an employé not authorized or ratified.[1]

2. MASTER AND SERVANT—ASSAULT BY CLERK.
   A corporation conducting a store, of which it employed a manager and clerk, is not liable for injuries caused by its clerk, whose only duties were to wait upon customers and take care of the stock, in assaulting and striking plaintiff with a hammer, where plaintiff's testimony indicated that the assault was unprovoked and unwarranted, defendant's testimony showing that plaintiff used improper and obscene language in the presence of women, and the clerk after ordering plaintiff out of the store attacked him.

Error to Houghton; Streeter, J. Submitted January 13, 1911. (Docket No. 84.) Decided December 29, 1911. Rehearing denied March 13, 1912.

Case by Joseph Ducre against the Sparrow-Kroll Lumber Company and Charles B. Kroll for personal injuries. Judgment for plaintiff against said company only and it brings error. Reversed, and no new trial granted.

Allen F. Rees (*C. B. Grant*, of counsel), for appellant.

P. H. O'Brien (*E. F. Le Gendre*, of counsel), for appellee.

MCALVAY, J. Plaintiff brought suit against both defendants to recover for injuries alleged to have been caused to him by an assault committed upon him by

[1] For various phases of question of master's liability for assaults by servants, see notes in 14 L. R. A. 737, 6 L. R. A. (N. S.) 567; 9 L. R. A. (N. S.) 1175; 12 L. R. A. (N. S.) 1155.

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Charles Struthers, who was an employé of defendant company. Defendant company was engaged in lumbering operations at Kenton, Mich., and, in connection with its business, conducted a general store at that place. The general manager of defendant company in charge of all its business was William Kroll. The defendant Charles B. Kroll was the manager of the store. Charles Struthers was a clerk in this store, employed to sell goods and wait upon customers. On the day plaintiff was hurt, he came to the store of defendant company in a state of intoxication, and began to be familiar with a woman who was present with her little child, putting his hand upon her shoulder and talking to her. He used profane language in the presence of women, and, it is claimed, he also used obscene language which is unprintable. This conduct continued for some time while plaintiff was walking around in the store. He was not in the store as a customer or by invitation. He claims on the trial he was there to get a job for a friend. After a time the clerk, Struthers, as plaintiff claims, ordered him to go out, and put his hand on his arm, and plaintiff, having become quiet, was standing by the stove, when the clerk suddenly attacked him with a hammer, knocking him down. He was then put out a side door. About half an hour later, he went to a doctor's office, and was then so intoxicated that the doctor did not wish to do anything with him that morning. The blow plaintiff received fractured his skull. This was treated by the doctor on the following day. He was under the doctor's care for four months, and was then discharged.

In both counts of his declaration, plaintiff charges that defendant Charles B. Kroll, as manager of the store, and the clerk, Struthers, both acting for defendant company, committed this assault, and that Charles B. Kroll directed Struthers to use the hammer upon plaintiff. In both counts plaintiff bases his claim upon the participation in the assault of the manager of the store. Struthers was not made a party defendant.

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The jury returned a verdict in favor of the plaintiff and against defendant Sparrow-Kroll Company only.

It will not be necessary to consider all of the errors relied upon by defendant company, which has brought the case to this court for review. The verdict of the jury has eliminated any consideration of the connection of the manager of the store, Charles B. Kroll, with the assault, or any liability of the appellant by reason of his conduct. The appellant can therefore be liable only because of imputed responsibility.

In order to make defendant company liable for the assault upon plaintiff, it must be held that it was committed by Struthers acting as clerk of defendant company, and within the scope of his employment. If the testimony of plaintiff and his principal witness, Connor, is true, then the assault on the part of Struthers with the hammer was wanton, wilful, and intentional, and no other conclusion can be drawn from all of the evidence in the case.

Under such circumstances, can this court hold that Struthers was acting within the scope of his employment, express or implied?

In determining the question of the liability of the master for the torts of his servant, committed while in his employment, the line appears to be drawn by the authorities between those acts negligently or unskillfully performed, and those done by the servant in a wanton violation of law.

In an early case this court held:

"To render the doctrine of '*respondeat superior*' applicable, the injury must arise in the course of the execution of some service, lawful in itself, but negligently or unskillfully performed; for a wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone answerable. The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do seems to be too large. His liability depends upon the nature of the employment,

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the occupation of the person employed, and the control or authority of the employer over the person employed, as well as over the manner of the execution of the employment, and also upon the occasion and nature of the injury." *Moore* v. *Sanborne*, 2 Mich., at page 530 (59 Am. Dec. 209).

In a later case this court reaffirmed this doctrine. Mr. Chief Justice CAMPBELL, speaking for the court, said:

"The acts complained of were done in the regular course of their employment, and not by wilful wrong. In such cases the master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and that he is constructively present at them all. There are many cases of wilful misconduct for which an employer will not be liable, because, in such cases the wrongdoers may be regarded as having renounced his service to that extent. * * * But where the act is not wilful, and is done in the regular course of the employment, there is quite generally a distinct liability, resting on the grounds of an implied agency." *Smith* v. *Webster*, 23 Mich., at page 299.

Later, in a case where plaintiff, a foot passenger, sued for injuries, caused by a boy, who was a servant of defendant, driving a horse over him, Mr. Justice COOLEY, speaking for this court, said:

"The defense then requested the court to charge that the liability of the master does not ensue when the servant has intentionally or recklessly stepped aside from his employment to commit a tort, which the master neither directed in fact nor could be supposed, from the nature of the employment, to have authorized or expected the servant to do. This instruction the judge refused to give, but instructed the jury instead that if the boy 'drove in a careless and reckless manner he would be acting within the scope of his master's employment; but that if he wantonly, wilfully, and intentionally ran over the plaintiff he would not be acting within the scope of his master's authority. But if he carelessly, unintentionally, and accidentally ran over the plaintiff, then the plaintiff should recover.'

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"This instruction was all the defendant could reasonably ask. It stated the law correctly and fairly. If it was a case of intentional injury, defendant was not responsible." *Cleveland* v. *Newsom*, 45 Mich. 62 (7 N. W. 222).

While the facts were not identical with those in the instant case, the principle of law involved is the same.

A few authorities are cited where the courts have, in applying the doctrine of *respondeat superior*, held the employer liable for wilful and malicious acts by an employé, on the ground that they were within the scope of his employment. Such extreme views have never been entertained by this court.

The case of *Zart* v. *Sewing Machine Co.*, 162 Mich. 387 (127 N. W. 272), was a case of trespass *vi et armis*, brought against defendant and a local manager of its business in Detroit, for an assault committed while the said manager of defendant and an employé of defendant were forcibly taking a sewing machine from plaintiff's home. That he was the managing salesman of defendant, and so dealt with plaintiff in making the sale of the sewing machine to her, signing his name as such to the receipt for part payment, was undisputed. His authority in that business seems to have been plenary. He went to her home in that capacity to take the machine away from her. Although defendant company denied that the machine was its property, and it received no benefit from the sale, it was held that a question of fact was presented whether he was acting within the scope of his authority or for his personal benefit. The court, among other things, charged the jury:

"The defendant Singer Sewing Machine Company is not liable, unless you find that it actually owned the machine sold by Brandau to plaintiff."

The jury must have found this fact against defendant company. This court, speaking through Mr. Justice STONE, said:

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"We are of the opinion that the case and the charge fall within the doctrine of the case of *Canton* v. *Grinnell*, 138 Mich. 590 (101 N. W. 811)."

This last case cited is another case of trespass *vi et armis*, where a claimed assault was committed by the agents of defendant while removing a piano from plaintiff's residence. Mr. Justice MONTGOMERY, speaking for the court, said:

"The jury were instructed that the defendant would be only liable for those acts which were committed by the two truckmen in doing those things necessary in getting the piano. This instruction sufficiently guarded defendants' rights"—and cited as sustaining that proposition *Smith* v. *Webster*, *supra*.

The decisions in both these recent cases rest upon the authority of the doctrine laid down in *Smith* v. *Webster*, *supra*, which brings all of these cases within the cases of *Moore* v. *Sanborne* and *Cleveland* v. *Newsom*, relied upon in this opinion as declaratory of the law in the instant case. In this State our court has never departed from the rule laid down in *Cleveland* v. *Newsom*, *supra*, and has not adopted the modern rule, so called, which is invoked, and which goes to an extreme which this court is not willing to follow.

The violent and unexplainable assault of the man Struthers upon the plaintiff cannot be defined as recklessness, which is only a high degree of negligence. It was a wanton, wilful, and intentional injury, committed without regard to consequences, and within a narrow margin of having resulted in the crime of manslaughter. Under the circumstances presented by this record, such act cannot be held to have been committed by this man while in the performance of duties for defendant within the scope of his employment; and our conclusion is that, as a matter of law, no liability attached to the appellant, and the court was in error in not so charging the jury, as requested. It follows that other questions raised need no discussion.

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The judgment of the circuit court, for the reasons pointed out in this opinion, is reversed, and no new trial is granted.

MOORE, BROOKE, and STONE, JJ., concurred with MCALVAY, J.

BLAIR, J. I concur upon the ground that it is not within the scope of a clerk's employment to eject disorderly persons from his employer's store.

BURNHAM v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. CARRIERS—CASH FARES—EJECTING PASSENGERS.
   Where a passenger on defendant's train paid his fare, and the conductor, in placing the slip in his hat, by mistake indicated the wrong station, and later ejected the passenger who claimed that he attempted to explain the circumstances to the conductor but was not permitted to, it was not necessary for him to pay his fare the second time to avoid ejection; it also appearing that the conductor had in his possession a slip and evidence of the amount paid, which he could have readily examined and ascertained plaintiff's rights.[1]

2. SAME—EXCESSIVE DAMAGES.
   A judgment of $350 was not excessive for ejecting a passenger by the use of force, accompanied by abusive, profane, and improper language in the presence of plaintiff's wife and other passengers.

Error to Clinton; Searl, J. Submitted December 12, 1911. (Docket No. 39.) Decided December 29, 1911.

[1] Duty of passenger to pay fare wrongfully demanded, in order to avoid ejection, see note in 48 L. R. A. 706.

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Case by Jasper A. Burnham against the Detroit, Grand Haven & Milwaukee Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Harrison Geer (*W. K. Williams*, of counsel), for appellant.

Lyon & Moinet, for appellee.

STONE, J. This is an action on the case, in which the plaintiff, a resident and business man of St. Johns, Mich., seeks to recover from defendant damages for a claimed wrongful ejection from one of its west-bound passenger trains, on the morning of August 26, 1910.

It appears that the plaintiff and his wife, who had been visiting near the city of Flint, came to Durand and took the defendant's west-bound train No. 19, due to leave there at 9:45 a. m., for St. Johns. Neither of them had tickets. The plaintiff's wife claims to have gone on the train, entered a car, taken her seat, and paid her fare, in money, to the conductor. The plaintiff stood on the easterly platform of the passenger coach, immediately ahead of the parlor car, described as the vestibule. There were two other gentlemen standing on the platform with him as the train left Durand; the destination of one of them was Ovid. This Ovid passenger (whose name plaintiff does not know) and plaintiff continued to ride on the platform as the train approached Vernon station, which is the first stop west of Durand. Just before the train stopped there, the conductor came to plaintiff and the other man and collected their fares. Plaintiff paid 62 cents, consisting of two quarters, one ten-cent piece, and two pennies—the proper and legal fare from Durand to St. Johns. The man destined for Ovid also paid the legal cash fare to his destination.

According to the plaintiff's claim, the conductor did not have time to give them their hat checks before the train stopped at Vernon, as it was necessary for him to get off

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and attend to his train. He claims, and testified, that the conductor tore off from his pad a couple of cash-fare slips, and threw them on the platform at the plaintiff's feet; that plaintiff did not pick them up, and therefore had no cash-fare slip to show the amount of fare he had paid. After the train left Vernon, the conductor came to plaintiff and this man from Ovid, who were yet standing on the platform of the passenger coach, and took from his pocket two hat checks, wrote something upon each of them, and placed one in plaintiff's hat and one in the hat of the man from Ovid. The plaintiff testified that he did not know what the conductor wrote upon the hat check, and did not look to see.

Soon after this, the plaintiff went into the coach and took a seat, either the second or third from the east end of the coach and on the south side, sitting immediately ahead of his wife. He was somewhat afflicted with asthma, and claims that he had been suffering therefrom during the previous night, was sleepy, and soon after taking his seat fell asleep. As the train left Ovid, the conductor came through, saw plaintiff asleep, and testified that he observed plaintiff's hat check, showing that he was a passenger whose destination was Ovid. The conductor awakened the plaintiff and inquired where he was going, and was informed by plaintiff that he was going to St. Johns. The conductor told him that his hat check showed that his destination was Ovid, and that if he was going to St. Johns he would have to pay 18 cents, which was the legal fare from Ovid to St. Johns. The plaintiff informed the conductor that he had paid his fare to St. Johns in cash, and that the conductor must have made a mistake in the hat check. The conductor then asked him for his cash fare slip; and plaintiff testified that he informed the conductor that he had no cash-fare slip; that the conductor threw it on the floor when he tore it off his pad. The conductor insisted that the plaintiff should either pay the additional 18 cents, the legal fare, or leave the train at Shepardsville, the next station west of Ovid, and near which

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the train was at that time. As the train reached that station, the conductor again asked plaintiff to pay his fare or leave the train. He declined to do either.

There is a good deal of conflict in the testimony as to just what occurred here. The plaintiff claims, and offered testimony in support of his claim, that he sought to explain to the conductor all of the circumstances attending the payment of his fare, but that the conductor became angry and refused to listen to him; that he swore at the plaintiff, called him a deadbeat in a loud voice, and said that he met such deadbeats every day; and that he took hold of the plaintiff in a violent manner, and ejected him from the train by force. On the other hand, the conductor claims, and testified, that, when the plaintiff declined to pay, he thereupon took hold of plaintiff with no more force than was necessary, raised him from his seat, and that plaintiff walked down the aisle and out through the east door of the passenger coach, and stepped down onto the station platform at Shepardsville. There were from 25 to 40 passengers in the car at this time.

It is undisputed that as the train started west from the station the plaintiff again boarded it, came in, and took his seat by his wife in the coach; that the conductor came through the train shortly after this, and, observing the plaintiff, said, in substance, to him: "I thought I put you off at Shepardsville." The plaintiff replied, in substance: "You did, but I got on again." The conductor then informed him that they were going in on the siding a little west of Shepardsville to permit a train to pass them, and that when they got there he would put the plaintiff off the train again, unless he paid his fare. At this point, also, there is a sharp conflict in the testimony as to just what took place, and the manner and conduct of the conductor; the plaintiff claiming, and offering testimony in support of the claim, that the conductor again made use of profane language, and in a loud tone of voice, which could be heard throughout the car, denounced the plaintiff as a deadbeat, and saying that when he put him

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off the next time he (plaintiff) would stay off. While the conductor claims and testified, and offered evidence supporting his claim, that when plaintiff refused to pay the fare or leave the train, unless he was ejected therefrom, he (the conductor) thereupon took hold of plaintiff's shoulder, raised him out of his seat, and the plaintiff walked out of the train onto the ground. The train waited at this siding some minutes, and both the plaintiff and conductor, standing outside, indulged in some loud and profane language.

It is again the claim of the plaintiff that at this point the conductor asked him where he paid his fare, and that he then, for the first time, was permitted to explain to the conductor the circumstances; that he stated to the conductor there that he had paid him between Durand and Vernon, particularly stating the change which he gave him, and the circumstances of standing on the platform with the other man, and suggested to the conductor that he must have made a mistake, and put plaintiff's check in the Ovid man's hat, and the Ovid man's check in his hat. The plaintiff testifies that the conductor then said: "I remember; it is all right; get on there, and go on. You are all right; I remember it now." Whereupon he was permitted to enter the car and ride to St. Johns, and that the conductor, following him into the car, explained to those sitting near the plaintiff that there had been a mistake, but that the plaintiff had paid his fare.

On the other hand, the conductor claims, and offered testimony in support of his position, that, while standing upon the ground and talking with the plaintiff, he (plaintiff) reached into his pocket and brought out and showed to the conductor a cash-fare receipt; that he (the conductor) looked at it, and that it was for 62 cents; that thereupon the conductor reached into his own pocket and pulled out his cutter, and saw it was serially the same number; that they use a cash-fare cutter, and that they cut the cash-fare receipts off, and they are numbered serially, and he saw that that one was one of those serial

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numbers that came off that cutter for that day; whereupon he apologized to the plaintiff, shook hands with him, and helped him onto the train, and told him that if he had shown him that in the first place there would have been no trouble.

The conductor testified that he took the fares just as the train was coming into Vernon; that one man was for Ovid and one for St. Johns; and that each paid cash fare. He further testified that he did not remember what he did with the cash slips, and that he could not say that the plaintiff was wrong in the statement that he threw them upon the platform. He remembered that he did not issue the hat checks at the same time that he collected the fares. He further testified as follows:

"I kept a memorandum and duplicate of cash slips to turn in, so that if I issued a cash slip for Burnham's fare and threw it on the floor I had a duplicate in my pocket. Mine would show the stations from which to which the fare was paid; and I had it right in my pocket at the time of this controversy with Mr. Burnham."

He further testified that he could not examine his cash-fare slips to see if he had a cash-fare slip corresponding with the claim of the plaintiff that he had paid his fare from Durand to St. Johns, without having the passenger's cash-fare receipt to compare with it; that he knew that 62 cents was the fare from Durand to St. Johns, and that he did not recollect at the time he testified of any other place from any of those stations west of Durand where 62 cents was the fare from that station to some point west; that his end of the slip would show the stations and the amount; that he did not examine his slips to ascertain whether he had any, and if so how many, slips showing 62 cents paid fare from Durand to St. Johns. He claims that it would have been necessary for him to have examined the hat checks of all the passengers to have determined that the plaintiff had paid his fare. The following occurred upon cross-examination:

"*Q.* If you looked at your cash checks, they would

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show, if you had any, and if so how many, cash checks showing 62 cents fare paid from Durand to St. Johns, wouldn't it?

"*A.* Yes, sir.

"*Q.* And you didn't look at those, did you?

"*A.* No, sir.

"*Q.* If you really wanted to find out whether this man paid his fare from Durand to St. Johns—62 cents—you could get some light on the subject by looking at your part of the cash check, couldn't you?

"*A.* I could find out how many were paid.

"*Q.* Precisely. Do you recollect more than two upon that occasion, namely, Mrs. Burnham and Mr. Burnham, who paid cash fare from Durand to St. Johns—62 cents?

"*A.* I would not say.

"*Q.* You have no recollection of more than those two, have you?

"*A.* No, sir. * * *

"*Q.* And you made no effort of any kind, character, or nature to look over your cash-fare slips you had in your possession to determine how many, if any, persons upon that train had paid cash fare from Durand to St. Johns that morning—62 cents—did you?

"*A.* No, sir."

This witness further testified that his duplicate report, made at the end of his run, showed two cash fares from Durand to St. Johns that day, one No. 77, and the next No. 78, and each of them 62 cents; that it showed that he received only two cash fares from Durand to St. Johns that day. And it also showed that he received a cash fare from Durand to Ovid, 44 cents.

"*Q.* You are not prepared to say, are you, but what those two cash fares from Durand to St. Johns upon that train were paid, the one by Mr. Burnham and the other by Mrs. Burnham?

"*A.* I would not say as to Mrs. Burnham."

The case was submitted to the jury under a very full charge by the court, and a verdict of $500 for the plaintiff was returned.

Upon a motion for a new trial, based upon the grounds that the verdict of the jury was excessive and unreason-

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able, and that in no event could the plaintiff recover more than nominal damages, the circuit judge announced that he would order a new trial of the case, unless the plaintiff would accept $350 damages. The plaintiff elected to accept this, and a judgment for the plaintiff for $350 was duly entered. The defendant has brought the case to this court, and has assigned errors upon the rulings of the court in admitting testimony, upon refusals of the court to charge as requested by defendant, and upon the charge of the court.

The defendant claims (1) that the court erred in not holding that the case of *Frederick* v. *Railroad Co.*, 37 Mich. 343, and kindred cases, are controlling of the case, and that the plaintiff, not having offered to pay his fare, could not recover in the case, and that the court should have directed a verdict for the defendant, as requested; and (2) that the plaintiff could not recover, in any event, more than nominal damages.

We have examined the record with some care and find no reversible error in the rulings of the court relating to the admission of testimony, nor in the refusals to charge as requested.

From the foregoing, it will be seen that there was a sharp conflict in the testimony as to the controlling facts in the case. We are of the opinion that the case was fully and fairly submitted to the jury by the trial judge. We quote the following from the charge:

"Now, gentlemen of the jury, it does not seem to be seriously disputed here but what Mr. Burnham did actually pay his fare from Durand to St. Johns, and that he ordinarily would be entitled to ride that distance; but I charge you, as a matter of law, that that alone would not be enough to entitle him to recover here. The fact that he had actually paid his fare from Durand to St. Johns, and that he was put off the train at Shepardsville, would not be enough to entitle him to recover. It is the duty of a passenger, and was the duty of Mr. Burnham in this case, if he received this cash slip from the conductor, to retain it, and when any question was raised about his right to ride to his destination it was his duty to have produced the cash slip, if he had it; and if he didn't have it,

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had lost it, or anything of that kind, it was his duty to explain to the conductor, if he was given an opportunity to do so, the circumstances under which he paid his fare. So that the first question, perhaps, that you will reach in this case will be the question of whether or not he received this cash-fare slip from the conductor. If the conductor simply threw the cash slip upon the floor, it would not be the duty of Mr. Burnham to pick it up; he would have a right to consider that the conductor didn't treat that as evidence of his right to ride, and expected to give him a hat slip, or something of that kind. He would not be obliged to reach down and pick it up. But, if the conductor handed it to him, it would be his duty to keep it and preserve it, and produce it upon request. So I charge you, as a matter of law, that if he actually did receive this cash slip, and had it at the time the controversy came up in the car there, and failed to produce it when the conductor asked for it, then, in that case, he cannot recover in this case, and your verdict should be for the defendant, no cause of action.

"That is for this reason, that, even though he had actually paid his fare, and was entitled to ride, he could not keep the cash slip in his pocket, and simply say, 'I paid my fare, and I won't pay it again;' but he must go further than that and produce the cash slip, or some explanation about it, or else he must pay his fare over again, and then collect the money back from the railroad company. His action in that case would simply be for the extra fare paid; but he could not sit there and say, 'I paid once, and I won't pay again,' or words to that effect, and not attempt to show the conductor why he had paid, and produce the receipt, if he had one, or make explanation about it, and allow himself to be put off and recover damages in this way. So you will see, if he actually had the cash slip when the controversy came up, and didn't produce it, then he cannot recover in this case.

"Now, if he didn't receive the cash slip and didn't have it, and when the controversy came up he attempted to explain to this conductor the circumstances, the conductor having taken up his hat slip—I think it is practically conceded in the case that the conductor had taken the hat slip out of his hat—he then not having any evidence of his right to ride, if he then attempted to explain to the conductor the circumstances under which he paid his fare, and the conductor refused to listen to him, shut him off, and would not listen to what he said about that, but then

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and there put him off, compelled him to get off the train, then in that case he would be entitled to recover in this case. So that you will see that the real turning point in this case is the question of what took place there in the car, and whether or not, if you find he didn't have a cash slip, he made an honest effort to explain to the conductor the circumstances under which he paid his fare.

"Now, the fact that he went back on the train again, after being put off once, would not change the case in any way. If he had actually paid his fare, he would have a right to get back on there again, but the same rule would apply again when the conductor asked him for his cash slip, or more fare; it would have been his duty the second time to have explained it in the same way, and I have already laid down the rule what he should have done in that case, and if he didn't explain or produce the cash slip, if he had it, he cannot recover. If he did attempt to explain, and the conductor shut him off and would not allow him to, then he can recover."

1. We think that the meritorious question in the case is whether it is governed by *Frederick* v. *Railroad Co.*, 37 Mich. 343 (26 Am. Rep. 531), and the cases that have followed that doctrine. It is contended that, inasmuch as the plaintiff might have paid his fare, and avoided being expelled from the train, he is entitled to recover only nominal damages.

In speaking of *Frederick* v. *Railroad Co.*, *supra*, and kindred cases, Justice MONTGOMERY said, in *Zagelmeyer* v. *Railroad Co.*, 102 Mich. 214, at page 215 (60 N. W. 436, 47 Am. St. Rep. 514):

"But all the cases cited are cases in which the plaintiff had no ticket which, as between himself and the conductor, entitled him to ride upon the car in question, and in which there was no tender of the legal fare made. We think the cases of *Hufford* v. *Railroad Co.*, 53 Mich. 121 (18 N. W. 580), *Id.*, 64 Mich. 631 (31 N. W. 544, 8 Am. St. Rep. 859), fully recognize the right of the plaintiff to recover substantial damages for being evicted from the car when he either produces a ticket, or stands ready to pay the legal fare."

We have quoted from the charge to show that the jury

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were instructed that, if the plaintiff actually received the cash slip, and had it at the time the controversy came up in the car, and failed to produce it when the conductor asked for it, then the plaintiff could not recover. The jury must have found, therefore, that the plaintiff did not have this cash slip in his possession.

We think that *Frederick* v. *Railroad Co.*, *supra*, can be distinguished from the instant case. Here the passenger paid his legal fare in cash, and the conductor obviously made the mistake, and there was evidence that he refused to listen to an explanation which, when finally permitted to be given, set the plaintiff right, and he was permitted to continue his journey. The case may also be distinguished from the *Frederick Case* in this: That here the conductor had in his possession the cutter and copy, which, with a little care and examination, would have explained and made clear the whole difficulty, and there was evidence that he alone was possessed of the cash-fare receipt, or a duplicate of it.

In *Humphrey* v. *Railways Co.*, 166 Mich. 645 (132 N. W. 447), the passenger had an ambiguous or questionable ticket that needed an explanation, but she was permitted to recover, and we held that the *Frederick Case* was not applicable where an examination would have explained the matter.

In *Light* v. *Railway Co.*, 165 Mich. 433 (130 N. W. 1124), the *Frederick Case* was relied upon by the defendant, but we held that the rule, requiring a passenger to pay his fare a second time, if he has the money, should not be extended so as to compel him, if he has not the money, to endeavor to borrow it of his friends or acquaintances on the train.

2. Upon the question of the amount of judgment, we need only refer to the evidence on the part of the plaintiff, and to the two cases last above cited. In *Humphrey* v. *Railways Co.*, *supra*, Justice BROOKE said:

"Good faith and respectful treatment are imperative.

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Insults and wanton abuse are intolerable and are actionable. Whether the conduct and language of defendant's agent in the case at bar were such as to render the defendant liable was a question of fact for the jury, under proper instructions."

In the instant case, there was evidence of rude, profane, and abusive language in the presence of the plaintiff's wife and other passengers on the part of the conductor, which, if believed by the jury, warranted substantial damages, and we cannot say that the judgment was excessive.

We have examined the entire record with care, and are of opinion that there is no reversible error, and the judgment of the circuit court is affirmed.

OSTRANDER, C. J., and STEERE, MOORE, and BROOKE, JJ., concurred.

HAMMOND *v.* HIBBLER.

1. LANDLORD AND TENANT—LEASES—COVENANTS—WAIVER.
   By granting permission in writing to a tenant, "but not to his heirs, assigns, executors, administrators or any other person," to conduct a bar in connection with a hotel which he was operating on premises leased subject to a restriction against selling intoxicating liquors, the landlord did not waive his right to enforce the restrictive clause against assignees of the hotelkeeper's interest.

2. SAME—CONSTRUCTION.
   A restriction contained in a lease for a term of years should receive more favorable consideration than a restriction in a deed.

   OSTRANDER, C. J., and STEERE and STONE, JJ., dissenting.

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Appeal from Wayne; Hosmer, J. Submitted April 13, 1911. (Docket No. 114.) Reargued October 10, 1911. Decided December 29, 1911.

Bill by Edward P. Hammond and others against Frank B. Hibbler to enjoin defendant from conducting the sale of intoxicating liquors contrary to the terms of a written lease. From a decree for complainants, defendant appeals. Affirmed.

A. B. Hall, for appellant.

Luman W. Goodenough, for appellees.

OSTRANDER, C. J. The material facts are that in the year 1906 complainants leased certain premises in the city of Detroit for a period of 10 years to Charles Hinkle and Allan Nowlin. The lessees, under a permissive clause in the lease, assigned it to the Hinkle-Nowlin Company, a corporation. There were two buildings upon the property, now known, respectively, as the Gayety Theater and the Hotel Harrington. In 1907 the assignee of the lessees leased the hotel to James W. Harrington for the balance of the term. In and by the original lease, it was agreed "that no building or part thereof be sublet for or used as a saloon, or that the sale of intoxicating liquors of any form be permitted on said premises," but in the lease from the Hinkle-Nowlin Company to Harrington it was provided that if Harrington could obtain written permission from the complainants to sell liquor in the hotel his lessors would consent thereto. Complainants gave this permission to Harrington in accordance with a certain written agreement made between them, which provided, among other things, that, so long as a respectable hotel was conducted on the premises, the privilege of selling liquor therein would be extended to Harrington, "but not to his heirs, assigns, executors or administrators, or any other person" For this privilege Mr. Harrington agreed to pay complainants $100 a month. By the same agree-

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ment, complainants agreed to loan Mr. Harrington $4,000, to be used in constructing a new front or addition to the hotel. They advanced this money, and for security took a mortgage upon the leasehold interest. A new front was added to the building, and the bar was opened early in the year 1908. During the latter year, Mr. Harrington borrowed money of the defendant, and gave him a second mortgage upon the said leasehold, and thereafter Hibbler advanced still more money, some of which was used to pay interest on the first mortgage and to pay for the bar privilege. In September, 1908, complainants wrote to Harrington a letter, a copy of which was sent to defendant, stating that, unless the bar was conducted in a first-class manner, the privilege of selling liquors would be revoked; and, further, that complainants refused to recognize the defendant, Hibbler, as entitled to any of the privileges granted to Harrington. Late in the same summer the Pittsburgh Plate Glass Company, which had furnished materials for rebuilding the hotel, obtained a judgment against Harrington, and levied upon his leasehold interest. Upon a sale under the levy, this interest was sold to the judgment creditor, and by it, December 3, 1908, to the defendant, Hibbler, and his brother, who bought subject to complainants' prior mortgage. Hibbler also obtained from Harrington a quitclaim deed of his interest in the leasehold premises. Hibbler applied to complainants for an agreement extending the same privilege to him in relation to the bar as had been given to Harrington. The terms of an agreement were stated by complainants, but no agreement made. Hibbler was notified in January, 1909, that the privilege of selling liquor upon the premises would not be extended to him, and that he must discontinue the sale of liquor at once. He made no reply, but continued the sale of liquor.

Complainants filed their bill, setting up the facts, the substance of which has been stated, and asked for a decree perpetually restraining defendant from using the premises, or any part of them, for a saloon, or selling liquor upon

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the premises in any way whatsoever. A preliminary injunction was also asked for. It is not charged in the bill that the hotel and bar are not properly conducted, and no competent evidence of the fact appears in the record. It is charged that if the sale of liquor is continued the value of the property will be greatly depreciated. The preliminary injunction was refused, the bill was answered, the cause was heard upon pleadings and proofs taken in open court, and a decree entered in accordance with the prayer of the bill. The defendant has appealed.

It is claimed by appellant that the giving to Harrington of the license or permission to sell liquor operated, in law, to remove or release the restriction concerning the sale of liquor upon the premises. It is also claimed that by virtue of the execution sale the Pittsburgh Plate Glass Company succeeded to the rights of Harrington, and that Hibbler, the defendant, succeeded to the rights of the Plate Glass Company.

It is the law of this State that a condition or covenant in a deed of real estate, restricting the use to which the property may be devoted, and not opposed to sound public policy, may be sustained and enforced if the party in whose favor it is made or reserved has an interest in the observance of the condition or covenant. *Smith* v. *Barrie*, 56 Mich. 314 (22 N. W. 816, 56 Am. Rep. 391); *Watrous* v. *Allen*, 57 Mich. 362 (24 N. W. 104, 58 Am. Rep. 363); *Chippewa Lumber Co.* v. *Tremper*, 75 Mich. 36 (42 N. W. 532, 4 L. R. A. 373, 13 Am. St. Rep. 420); *Jenks* v. *Pawlowski*, 98 Mich. 110 (56 N. W. 1105, 22 L. R. A. 863, 39 Am. St. Rep. 522); *Whealkate Mining Co.* v. *Mulari*, 152 Mich. 607 (116 N. W. 360, 18 L. R. A. [N. S.] 147; *Reilly* v. *Otto*, 108 Mich. 330 (66 N. W. 228); *Wertheimer* v. *Wayne Circuit Judge*, 83 Mich. 56 (47 N. W. 47).

In the case last cited, and which, it appears, is relied upon by both parties here, the lease of a store was made for the sale of teas, coffees, spices, and similar goods, and the lessee was permitted to assign the lease or to sublet

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the premises only by the written consent of the lessor. Upon the application of the lessee, oral consent was given for the occupancy of the premises by another than the lessee, under the lease, who remained responsible for the rent. This consent was in its terms restrictive; the use of the premises specified being for the sale of small musical instruments and sheet music. It was later discovered that the Wertheimers, who were not the persons for whose occupancy consent had been given, were in possession of the premises, and they asked permission of the lessor to use them for a misfit clothing house. Permission was refused. The bill charged that the Wertheimers were in possession without the consent of the lessor, and proposed to continue possession and use the premises for the unexpired term for a misfit clothing house, and prayed for an injunction. An injunction was granted, and the cause was before this court on an application for a writ of mandamus to compel the court below to dissolve the injunction. It was held that:

"The terms of the lease were not waived, but a license given to Sprague to enter and carry on that particular business; Michell to be holden for the rent. Sprague had no right to sublet, and Michell no right to sublet to any one but Sprague, and for that particular business."

It was further held that the words in the original lease, "to be used for the sale of teas, coffees, spices, and similar goods," amounted to an express covenant not to use them for any other business; that it was a covenant running with the land; and that, while the written stipulation not to sublet, unless by consent in writing, might be waived by an oral agreement, a written consent was necessary to release the covenant and remove the restriction as to subletting, because such was the requirement of the lease. It will be seen that the opinion deals with two covenants—one not to sublet without permission given in writing; one not to use the premises for any but the specified business—and that the conclusion arrived at was that the oral permission to sublet to a particular person to

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carry on a specified business would not be enlarged or held to operate as a release of the covenants.

In the case at bar, the restrictive covenant in the lease, while mutually agreed to by the lessors and the original lessees, is presumed to have been inserted for the benefit of the lessors. The lessees would require no such covenant, since they controlled the use of the premises for the term. The essence of the restriction is indicated by its terms. It is not aimed at sales of liquor by a particular person, but at any and all sales. There can be no doubt that the lessors might have insisted that no liquors should be sold upon the demised premises during the term, and might have enforced the restriction by injunction; see cases above cited and those collected in 18 Am. & Eng. Enc. Law (2d Ed.), p. 637; and as well against assignees, or sublessees, with notice of the restriction, as against the original lessee. It was said by this court, in *Smith* v. *Barrie*, *supra*, that:

"In those cases in which the condition has had for its purpose a restraint upon the business of dealing in intoxicating drinks, the interest of the grantor in its enforcement has been specially prominent in the mind of the court in passing upon the condition."

But, whether we consider the interest of the lessors separate from the leased premises, or their interest in the premises as property, the conclusion must be that they have distinctly waived the covenant, so far as it affects sales of liquor in the hotel. They consented that liquor might be sold in the hotel. They were willing that defendant should continue to sell liquor there, and have proposed, or stated, the terms upon which consent would be formally given. The lessees have expressly consented that the restriction be released, so far as it affects sales of liquor in the hotel. May the lessor now have the aid of a court of equity to enforce the restriction? Complainants say the release or waiver was itself restrictive and limited to sales of liquor by Harrington. Is the fact important? The essence of the restrictive covenant is, as

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has been pointed out, not that sales of liquor shall be made by certain persons only, but it is that no sales shall be made on the premises. It is waived, essentially, when any sales, by any person, are permitted. It does not follow, however, that because equity will not enforce performance of the covenant by injunction, defendant may insist upon a release of the restriction without performing the agreement for the waiver. It would be inequitable if he were permitted to do so. In his answer, defendant professes that he is ready to pay all charges which Harrington agreed to pay to secure the waiver. We think he should be permitted to do so.

The decree making the injunction perpetual will be affirmed, unless within 40 days from the entry of the decree in this court defendant pays to complainants so much of the sum of $100 per month as remains unpaid. Upon such payment being made, the injunction will be dissolved, with costs of both courts to defendant. Otherwise complainants will recover costs.

STEERE and STONE, JJ., concurred with OSTRANDER, C. J.

BROOKE, J. My Brother OSTRANDER says:

"The essence of the restriction is indicated by its terms. It is not aimed at sales of liquor by a particular person, but at any and all sales."

This is true; but it is equally true that the essence of the waiver is to permit liquor to be sold upon the premises by Harrington only. Many reasons, aside from the increased money rental, might operate upon the minds of the lessors to induce them to modify or waive the restriction as to a particular individual. The reputation of that person as to character and respectability, and particularly as to his being a law-abiding citizen in the conduct of the business about to be engaged in, would have great weight. I am therefore unable to agree with my Brother OSTRANDER when he says that the restriction is waived essentially when any sales by any person are permitted.

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Moreover, I am of opinion that a restriction in a lease for a term of years should receive much more favorable consideration than a restriction in a deed. While it may be said of both that they are in derogation of the grant, yet in the case of the deed the grantor has parted with his right to repossess himself of the demised premises in the future, while in the case of a lease the lessor contemplates such repossession, and, at the expiration of the term, must accept his premises (if improper or disreputable use has been made of them) burdened by an unsavory reputation, which might, in conceivable instances, result in large financial loss.

As was said in *Wertheimer* v. *Wayne Circuit Judge*, 83 Mich. 56 (47 N. W. 47):

"Covenants are not infrequently inserted in leases that the lessee shall not carry on particular trades upon the premises. This precaution often becomes necessary, not only for the protection of the premises from injuries which might otherwise be done to them, but to prevent their respectability being lessened, and their good will thereby diminished."

It cannot be questioned that the sale of liquor may be so conducted upon premises as to injure their reputation little or not at all. Upon the other hand, if the lessee caters to the low, the vicious, and the dissolute (and many in the business do so cater), it seems plain that the leased premises would acquire such a reputation as would seriously affect their value to the lessors at the expiration of the term.

I am of opinion that the decree should be affirmed.

MOORE, MCALVAY, and BLAIR, JJ., concurred with BROOKE, J.

BIRD, J., did not sit.

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J. H. WORDEN LUMBER & SHINGLE CO. *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY CO.

1. EVIDENCE—BURDEN OF PROOF—TRIAL.
   Too high a degree of proof is required of a plaintiff by instructions to the jury that plaintiff had the burden of proof, and must establish the issue by a preponderance of the evidence clear and well defined, and must prove to the satisfaction of the jury the claim made.

2. SAME—BOOKS—INSPECTION.
   It was not error to admit in evidence books of defendant, kept in the usual course of defendant's business, showing that the grates, ash pan, dampers, and netting of its locomotive which plaintiff claimed set a fire, were inspected and found in proper condition on the day after the fire.[1]

3. SAME—WEATHER REPORTS—REMOTENESS.
   Weather reports from stations on either side of the fire, but at considerable distances therefrom, should not have been admitted in evidence without supporting testimony to show that they tended to indicate the direction of the wind at the place of the fire.

4. TRIAL—WITNESSES—CROSS-EXAMINATION.
   Wide latitude in the cross-examination of plaintiff's chief witness was permissible.

5. TRIAL—ARGUMENT—IMPROPER CONDUCT OF COUNSEL.
   It was reversible error for defendant's counsel, in an action for negligently causing a fire, to persist in bringing to the attention of the jury the fact that plaintiff was insured after the court had ruled it out.

Error to Chippewa; Steere, J. Submitted June 23, 1911. (Docket No. 101.) Reargued October 16, 1911. Decided December 29, 1911.

Case by the J. H. Worden Lumber & Shingle Company against the Minneapolis, St. Paul & Sault Ste.

[1] Presumption as to negligence in case of railroad fires, see notes in 15 L. R. A. 40; 5 L. R. A (N. S.) 99.

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Marie Railway Company for negligently setting fire to plaintiff's property. Judgment for defendant. Plaintiff brings error. Reversed.

Albert E. Sharpe and *Barger & Hicks*, for appellant.

E. S. B. Sutton (*A. H. Bright* and *Warner & Sullivan*, of counsel), for appellee.

BLAIR, J. This is an action, brought by insurers in the name of plaintiff, the insured, to recover damages for the alleged negligent destruction of property by fire set by one of defendant's engines.

The declaration consists of four counts. It is alleged in each count that on August 8, 1908, a large stock of lumber, etc., valued at $70,000, and a dwelling house, valued at $500, belonging to the plaintiff and situated adjacent to the defendant's line of railroad at Dick, in Chippewa county, were destroyed by a fire which was communicated thereto by sparks of fire from a passing locomotive engine of the defendant, by reason of defendant's negligence. The negligence charged in the first count is the improper and insufficient equipment of the locomotive for the prevention of fires from sparks therefrom; in the second, the bad and improper state of repair and condition of the locomotive and the spark-arresting devices, smokestack, and other appliances thereof; in the third, the improper and negligent handling and management of the locomotive; and the fourth count is based on section 6295, 2 Comp. Laws, and alleges the destruction of the property by fire from the locomotive, for which defendant is liable by virtue of said statute. The trial resulted in verdict and judgment for defendant, to reverse which plaintiff prosecutes this writ of error.

The errors relied upon for reversal are as follows:

(1) That the court below erred in his charge to the jury, in requiring of the plaintiff that it establish to the satisfaction of the jury, by preponderance of evidence, clear and well defined, the fact that the locomotive of defend-

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ant set the fire, and in requiring the jury to first find the fire was set by the locomotive before entering upon a consideration of the evidence as to the condition and management of the locomotive at the time.

(2) That the court below erred in admitting in evidence the memorandum of alleged inspection of the locomotive after the fire, purporting to show its condition at that time.

(3) That the court below erred in admitting in evidence the records of the weather bureau at Sault Ste. Marie and Escanaba, purporting to show the direction of the wind at those points at different hours of the day of the fire.

(4) That the court below erred in permitting defendant's witness Nelson Cray to testify to alleged statements, claimed to have been made to him by plaintiff's witness J. W. Myers some time after the fire, regarding the origin of the fire, and statements claimed to have been made by Myers to Cray, relating to conversations between Myers and certain insurance adjusters concerning the origin of the fire.

(5) That the court below erred in permitting the introduction of evidence relating to insurance on the property destroyed; and that defendant's counsel further improperly brought the same subject before the jury by persistent questioning of witnesses on the subject and statements in argument to the court and to the jury.

1. The court instructed the jury as follows upon this subject:

"Now, upon the first question, which is, of course, the one which you should first take up and determine, the burden of proof is on the plaintiff, the party bringing the suit, to establish that sparks from this engine set the fire which consumed the lumber; and by 'burden of proof' we mean a preponderating, overweighing, or overbalancing of that in the testimony which tends to prove the truth or falsity of the matter which you have under consideration. If the testimony upon a question which you are deciding was just evenly balanced, as much in favor of it as there was against it, there would be no preponderance, and in that case the jury must necessarily decide in the negative; but if there is, in the mind of the jury, an overweighing, or preponderating, or overbalancing, of the testimony in favor of a proposition, clear and well defined, even though not beyond a reasonable doubt,

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the jury would have a right to find a verdict in favor of the proposition. Now, the fact that this engine set this fire must be proven to your satisfaction, before you go further. It need not necessarily be proven by the testimony of any eyewitness—any person testifying that he saw it set—but by facts and circumstances proven in the case to your satisfaction, which furnish evidence which reasonably leads an unbiased and inquiring mind to the conclusion that a cinder from that particular locomotive caused this fire. Under the law, the evidence is not sufficient, if it establishes no more than that the fire might have been so set. The jury must find that the testimony preponderates upon that proposition, and should be satisfied that it was so set."

This instruction required a higher degree of proof than the law requires, and was therefore erroneous. *Hoffman* v. *Loud*, 111 Mich. 156 (69 N. W. 231); *Walsh* v. *Taitt*, 142 Mich. 127 (105 N. W. 544).

2. The memorandum in question was two pages of a book produced by defendant, and purported to show the examination of the locomotive in question on the morning following the fire. One page read as follows:

"Aug. 4th. No. of engine 29; condition of grates, ash pan and dampers, good. By whom examined: N. Matheson."

The other page was as follows:

"Aug. 4th. No. of engine, 29; condition of netting, good. By whom examined: N. Matheson."

The book was kept in the usual course of defendant's business, and the entries were properly admitted. *Meyer* v. *Brown*, 130 Mich. 449 (90 N. W. 285); *Modern Match Co.* v. *Railroad Co.*, 140 Mich. 570 (104 N. W. 19).

3. The court admitted in evidence certified copies of the reports of the United States Weather Bureau, showing the condition of the wind on the 3d day of August (the day of the fire), from midnight previous to midnight following, at Escanaba and at Sault Ste. Marie, against the objection that such reports were incompetent, immaterial, and too remote. That such reports are admissible in a proper case we have no doubt. *Hart* v. *Walker*, 100

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Mich. 406 (59 N. W. 174). But, in the absence of testimony tending to show that the direction of the wind at Escanaba, about 120 miles west of Dick, and at Sault Ste. Marie, about 40 miles east of Dick, had some tendency to show the direction of the wind at Dick, we think such records were not admissible.

4. The assignments of error included under this head are the ninth, sixteenth, and eighteenth, which are as follows:

"The court erred in permitting leading and suggestive questions to be put to the witness Cray; the testimony referred to being the following question, and other similar questions following it in the record:

"'*Q.* Did Mr. Myers, on that occasion, when you were there on the 18th of December, 1908, at Dick, say to you that the fire occurred between two lumber piles about 70 feet north of the track, and a little east of the switch, or words to that effect?'

"(Objected to as leading, and that witness should state his own recollection of it first, before the words were put into his mouth."

"The court erred in permitting leading questions to be put to the witness Cray, relative to certain conversations which he claimed to have had with the witness Myers, relative to insurance and the cause of the fire."

"The court erred in permitting the witness Myers to be interrogated, relative to a certain conversation with witness Cray regarding insurance upon the property burned, and the statements of Myers made to Cray some time after the fire, relative to his theory as to the cause of the fire, and his conversation with insurance adjusters relative to it."

Mr. Myers was plaintiff's general superintendent at the time of the fire, was present at the station when the train came in, and gave very important testimony covering plaintiff's entire cause of action, and great latitude was permissible on his cross-examination. We find no error on the part of the court relative to such cross-examination.

As to the examination of Mr. Cray, defendant's claim agent, appellant's brief alleges, "These matters were brought out under the subterfuge of attempting to im-

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peach Myers;" and it is contended, among other things, that no proper foundation was laid for the impeaching questions. This point is not raised by the exceptions and assignments of error, and the trial judge, on the only occasion when the objection was made that Myers had not been interrogated upon the particular subject, struck out the answer. As the record stands, there was no prejudicial error in the court's rulings.

5. We think it was reversible error for the defendant's counsel to persist in bringing the subject of insurance to the attention of the jury after the court had ruled it out. *Peter* v. *Railway Co.*, 121 Mich. 324 (80 N. W. 295, 46 L. R. A. 224, 80 Am. St. Rep. 500).

The judgment is reversed, and a new trial ordered.

OSTRANDER, C. J., and MOORE, MCALVAY, BROOKE, and STONE, JJ., concurred.

BIRD and STEERE, JJ., did not sit.

KEELEY v. CITY ELECTRIC RAILWAY CO.

1. CARRIERS—BOARDING AND ALIGHTING OF PASSENGERS.
   It is the duty of employés in charge of a street car to ascertain who and how many of the passengers intend to alight at a place where the signal has been given to stop, and to wait a sufficient time to allow them to alight in safety, in the exercise of reasonable diligence, and such employés are required to see and know that no passenger is in a perilous position when the car is started.[1]

2. SAME.
   After the car has waited a reasonable time for passengers to

[1] Duty of street car conductor to see that passenger is off before starting car, see note in 11 L. R. A. (N. S.) 140.

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alight, and no passenger is in the act of leaving the car, and the conductor has no notice or knowledge of the intention of a passenger to alight, it is not negligence to give the signal to start.

3. SAME—STREET RAILWAYS—CONDUCTOR.
It is the duty of the conductor, before signaling to proceed, to look about and ascertain that all passengers are safely on board.

4. SAME.
And a passenger, riding on the platform of a crowded car or trailer, might be warranted in stepping to the ground when the car stopped and upon the rear platform of a preceding car in the same train.

5. SAME—CONTRIBUTORY NEGLIGENCE.
Nor was an infant nine years old guilty of contributory negligence, as a matter of law, for leaving the platform on which he was riding and attempting to board the next car at a stopping place, though he did not know why the cars stopped, did not see any one attempting to leave or enter the car, and did not know where the conductor was.

6. SAME—NEGLIGENCE.
It could not be said, as a matter of law, that the conductor need not anticipate that plaintiff would leave his position and try to secure another.

7. SAME.
The carrier is not an insurer of the safety of passengers.

8. SAME—TRIAL—ARGUMENT OF COUNSEL.
Where counsel for plaintiff, in the course of a somewhat inflammatory argument, stated that it was defendant's duty to see that plaintiff, an infant, had a safe position in which to ride, and the court, interrupting, stated that he could not so instruct the jury, but permitted counsel to proceed further with his argument, and in the course of his charge permitted the jury to take into consideration the claims of the respective attorneys without advising the jury to consider only the law as laid down by the court, a verdict which was opposed to the weight of the evidence is reversed and a new trial ordered.

Error to St. Clair; Tappan, J. Submitted June 27, 1911. (Docket No. 6.) Resubmitted October 10, 1911. Decided December 29, 1911.

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Case by George A. Keeley against the City Electric Railway Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

P. H. Phillips, for appellant.

Fred B. Brown (*Cyrus A. Hovey*, of counsel), for appellee.

The plaintiff, then nine years old, fell or was thrown under the wheels of one of defendant's cars and was injured. The time was the afternoon of December 24, 1901. The case for plaintiff, indicated by the declaration and supported by testimony, may be stated as follows: He, unattended, boarded a train of defendant's cars, consisting of a motor car and two trailers, at a railroad station in Port Huron, taking his place—the cars being crowded and the platforms occupied by passengers—on the front platform of the rear car. There was a single track, and passengers could, and did, enter and leave the cars from either side. On the journey towards the business center of the city, at a certain street crossing, the train was stopped. Plaintiff stepped upcn the street for the purpose of getting upon the rear platform of the car ahead of that on which he had been riding. While doing so, the train was started, and he, having secured a hold upon the platform railing of the car, was dragged for some distance, lost his hold, and was run over. There was no passageway from one car to another. There was but one conductor.

It is not claimed that the conductor saw the plaintiff or knew or had notice of his intention to change his position. It does not appear that plaintiff did not occupy a safe position on the rear trailer. In his charge to the jury the learned trial judge, after stating, concisely and clearly, the claims of the parties, added:

"These are the salient points of the claims of the respective parties. In addition, the attorneys for both par-

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ties have explained their claims in detail, and you may consider them in connection with this concise statement made by the court."

He further said that, under the declaration, plaintiff must establish at least two facts: First, that the car had come to a standing position when he attempted to board it; second, that it was suddenly started from a standing position as plaintiff was boarding it. He also advised them that if these facts were established by a preponderance of the evidence—

"If plaintiff did board the trailer at the Tunnel depot and rode from there to Minnie street as he claims, and there got off the trailer and immediately took hold of the handholds and put his feet upon the next car, at that moment when it was standing still, he was a passenger and entitled to the same reasonable precaution against accident that any other passenger similarly situated would be entitled to. You will recall that there is no proof that the conductor did in fact see the plaintiff attempt to board the standing car, so the question is: If he was so boarding the car, should the conductor, in the exercise of reasonable care in examining the approaches to his car, for intending passengers, have seen him and have known that the starting of the car, under the conditions that existed, would be likely to cause his injuries?"

The jury was also instructed:

"Now, as to the duty of the company to passengers attempting to board the car: You are instructed that where any street car has stopped at a street crossing to allow one or more passengers to alight, in a populated community, it is the duty of those in charge of the car to be alert to ascertain whether there are also intending passengers attempting to board the same car or cars. If a car has either stopped to let off a passenger, or for any other reason, an intending passenger at a street crossing would have a right to take advantage of that fact and board the car.

"In exactly the same manner, if you find from the proofs that the plaintiff was riding upon the front steps of the rear trailer, and the platform and steps were crowded with passengers, as he states, then he would have a right to step down upon the ground and step to and upon the

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steps of the platform of the next car while that car was standing still upon the track.

"You are further instructed that when he left the steps of the car, if he did so, and stepped down upon the ground to board the next car while it was standing still upon the track, then while he was upon the street he occupied the same position and was entitled to the same degree of caution on the part of the employés of the company as any other person who might have been attempting to board the car while it was standing still, and no further or different degree of care was due to him than to any other passenger attempting to board the same car under like circumstances.

"The reason for applying this rule is plain. As I have heretofore said, it is plaintiff's claim that he was upon the ground in a safe position just before he attempted to get on the car. There is nothing to show that he was not able to step up from the street upon the step and platform of the standing car as any older person in the same position. There is no proof at all of his inability to do this, and you have no right to assume such inability on his part to do this. Therefore the same degree of care and watchfulness for boarding passengers applies in this case as it applies in the case of all passengers under like circumstances. * * *

"If you find from the proofs that the boy was in fact boarding a standing car and in a dangerous position, and also find that the conductor failed to exercise reasonable care and prudence to discover the presence of boarding passengers at the time the car was started up and plaintiff injured, then your verdict should be for the plaintiff. If, on the other hand, the boy was in the act of boarding a standing car, as he claims, and you find from the proofs that because of the short space of time he remained at the point of boarding the car, or for any other reason, a reasonable, careful, and prudent inspection of the approach to the car would not have led to the discovery of his position in boarding it, then there was no breach of duty, no negligence on the part of the employés of the defendant company, and there can be no recovery by plaintiff. The reason for this must be plain to you, for, as I have explained, recovery must be based upon the breach of duty to make reasonable inspection for boarding passengers, and if for any reason that reasonable inspection, as I have explained it, would have failed to discover the impending danger,

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if there were any, then there has been no breach of duty, and consequently no liability on the part of the defendant company."

For defendant the court was requested to instruct the jury that:

"If the claim of the plaintiff in this case be true, he was in a position of safety on the car from the time the car started from the Tunnel Depot, up to the point where the accident occurred. The plaintiff admits that at the time of his alleged attempt to move from the position in which he originally was, to the platform of the other car, that he was not aware of the cause for the stopping of the car, and that he saw no one attempting to board or depart from the car. He further admits that he did not see the conductor at this time, and did not know where he was. Under these circumstances, it was his duty to know that the cars might start at any time, and in his attempting to leave the place where he claims he was and take a position on the other car, knowing this fact, and knowing that the conductor was not where he could see him, he was guilty of contributory negligence which would prevent his recovery in this case.

"The plaintiff claims in this case that he secured a position on the front end of the rear trailer, and that he occupied his position with safety and without danger from the point where the car started up to the point where the accident occurred. He admits that at the time the car stopped, as he claims, near Minnie street, he saw no person attempting to either board or alight from the cars, and that he did not see the conductor. If, under these circumstances, he attempted to change his position from one car to another, as he states the fact, the defendant cannot be charged with negligence on account thereof.

"While it was the duty of the conductor on this car not to start the car if any passengers were attempting to board one of the cars while it was stationary, until such passengers had gotten upon the car safely, it was not the duty of the conductor to anticipate that passengers securely upon the car would attempt to change their position, and his failure to observe the passengers attempting to so change their position from one car to another, without any indication to him that it was their intention to do so, would not constitute negligence.

"There is no testimony in this case tending to show,

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and no claim is made on the part of the plaintiff, that, at the point where the plaintiff claims the car stopped, there were any passengers waiting for the car or intending to board the car. Under these circumstances, no duty devolved upon the conductor that required any care in the starting of his car, so far as intending passengers were concerned. I therefore charge you that the act of the plaintiff in suddenly leaving his position on the car and attempting to board the car ahead was an action assumed at his own risk, and, even if there was a passenger alighting from the car, the conductor was justified in starting the car as soon as the passenger alighted, and if, during this time, the plaintiff attempted to change his position, the conductor would not be chargeable with notice, and there could be no recovery on the part of the plaintiff in this case."

These were refused. The testimony for defendant tended to prove that plaintiff was not a passenger upon this train; that the train did not stop at or near the point where plaintiff claimed he was injured; that plaintiff attempted to board the car while it was in motion.

One of the attorneys for the plaintiff in his argument to the jury employed the following language:

"Now I am going so ask your attention to some general considerations in this case. Have you got any right, Captain Danger, or any of you gentlemen, to go out and tear up the streets of the city of Port Huron, and put a street railway track down there and run cars and charge people 5 cents for riding upon it; when a farmer comes in town and a car comes along he has got to turn out of the way—or when a pedestrian comes along you have got to get out of the way of the car. You have no such right here because you have not any franchise. Who gives the franchise? The public. And what is that franchise? It is a privilege, is it not? A privilege to do what? A privilege to use the streets that belong to the people, to carry the people for pay, is it not? Is it a free gift carrying no responsibility, or does it carry a duty? It carries a duty, and that is to carry the blind, the old, the halt, the lame, the young, does it not? To carry them indiscriminately, does it not? * * * What are the street cars for? Are they for the people that can swing along in their automobiles or in their landaulets? Why, no, gentlemen, the street cars are the people's conveyances, are they not? And the poorer

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a man is the more he needs a street car. Now, this boy on that day had just as much right to ride upon that street car as though his name was John D. Rockefeller or Pierpont Morgan, just the same, and it was just the same duty of this company to carry him, and more than that, being a little boy nine years old. Some of you have got little children, possibly. You know what the responsibility of a little nine-year old boy is. Now he cannot take care of himself. It was their duty to look after him, was it not? Now, I say this young George was nine years old. Why we commonly say, if we want to put a man down in the scale, 'He doesn't know as much as a ten-year old boy,' and this was not a ten-year old boy, but nine years old. What is it that gives a man knowledge of the danger of street cars? It is observation first, is it not, and it is experience. Those are two things. Now, what is the peculiar characteristic of a nine-year old boy or a ten-year old boy? From eight to fourteen what is the peculiar characteristic? Why it is that you cannot keep him still a minute with a padlock. The only way you can get that boy still so he will stay so any length of time is to chloroform him and put him to sleep, and then he is liable to waken. The street car company were bound to know the nature of this boy. They were bound to look after him, because that is the duty of the street car company. What was the fair reasonable rule that governed this boy or that should govern him; that is, governing his responsibility? It was not the same as an adult. Of course, that is self-evident. The rule that should govern this boy, as we claim, was that ordinary discretion and judgment of boys of his years. That is all we claim; no more and no less. Now, we claim that it was the duty of the street car company to take charge of this boy when he stepped his foot—When does a man become a passenger on a street car? When the man steps his foot on the step, and when a man steps his foot upon the step of the car, he becomes a passenger, whether he has got hold of the handles or not. It was the duty of the railroad company, when this boy stepped his foot upon the step of that car the first time, to look after him. It was their duty not to let him ride upon the steps of that car, a little nine-year old boy, was it not? It was their duty to see that he took a safe position, not only to tell him to do it, but to see that he did.

"*The Court:* I don't know but it is my duty to inform

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you that the court cannot take that position, as a matter of law.

"*Mr. Hovey:* Would your honor do me the favor to tell me what position the court intends to take, for my information, in my argument to the jury?

"*The Court:* That this boy has all the rights that any boarding passenger would have at the time that he was on the ground and attempting to get on the car, if the jury find that to be the fact. The reason why I make that suggestion is because of the exception of Mr. Phillips to that line of argument.

"*Mr. Hovey:* Now, I understand, if your honor please, I have a perfect right to argue to the jury what I claim to be the law, whether it is the law or not.

"*The Court:* Well, go ahead; it is for you to determine that.

"*Mr. Hovey:* I do not want to run contrary to the opinion of the court, but I am simply claiming what I think is the legal right.

"*The Court:* You have had lots of experience in the trial of cases. I am not going to stop your argument. Make whatever argument you see fit.

"*Mr. Hovey:* Very well, I will go ahead and take my chances. Now, I say then that it was not only their duty to tell him to get in a safe place when he got on that car originally, but it was their duty to see that he did it. In view of the suggestion of the court, I am not going to pursue that; I am going to leave the truth of it to your inner consciousness, whether that is true or not."

Plaintiff recovered a verdict for $7,000, which the court refused to set aside. In so refusing, the court said, among other things:

"As stated, two juries have passed upon the questions of fact involved in this action. A crucial question of fact in each trial was whether or not the plaintiff received his injuries while boarding defendant's car after it had come to a full stop at Minnie and Twenty-Fourth streets. At each trial plaintiff produced proof that the car came to a full stop at or near that point, and that plaintiff received his injuries by means of the starting of the standing car while he was in the act of boarding it. At the first trial the plaintiff and a witness Alex Freeland testified that the car that injured plaintiff came to a full stop at the street crossing at Minnie street. Several witnesses for defend-

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ant testified that it did not so come to a full stop at that point or where plaintiff was injured. The court set aside the verdict of May 26, 1908, upon the finding that upon this crucial question the verdict was against the weight of the evidence. At the present trial plaintiff produced additional evidence that had a tendency to corroborate the evidence given by Freeland to the effect that he was in a position to see the car in question at the time plaintiff received his injuries. This evidence consisted of the testimony given by the witnesses Mary Hall, Earl Hall, and Violet McKenzie. Defendant also produced additional proof tending to support the claim that the car did not stop as claimed by plaintiff. This additional proof consisted of the testimony of the witnesses Henry Hoffman, Frank Mills, and Julius Phillips. The 24 jurors who heard and considered the conflicting evidence were as competent as jurors are likely to be at any number of trials of the case. From the proofs and results of both trials it is my conclusion that it is extremely unlikely that any different conclusion upon the essential facts will result from another trial. An examination of cases shows that more than one new trial after a second verdict for plaintiff on the same issues and on the ground that the verdict is against the weight of the evidence is very rarely granted. I conclude that it is not the court's duty to again interpose its judgment as to the weight of the evidence upon which the jury must have found for plaintiff. However the court may regard the question as to weight of all the evidence, the jury, upon competent evidence, now have a second time given credence and greater weight to the evidence as to defendant's negligence than that opposed to it. As to the allegations charging error because of prejudicial argument and statements made by plaintiff's counsel, the jury was so thoroughly instructed to eliminate all of plaintiff's other claims and to confine themselves to the sole question as to whether or not the conductor in charge of the car negligently started it from a standing position, thus causing plaintiff's injuries, that it is my conclusion that the jury followed these instructions and were not induced to render a verdict because of improper argument or prejudice."

OSTRANDER, C. J. (*after stating the facts*). The principal question of law is whether the court erred in instructing the jury concerning the duty of the conductor.

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For the purpose of deciding this question, the circumstances to be considered are those related by plaintiff and have been stated.

In Booth on Street Railways, § 349, the doctrine with respect to the duty of those in charge of street cars is stated in these words:

"It is the duty of those in charge of the car, when signaled to stop for the purpose of discharging passengers, to ascertain who and how many of the passengers intend to alight at that place, to wait a sufficient length of time to allow them to alight in safety by the exercise of reasonable diligence, and, in any event, to see and know that no passenger is in the act of alighting, or is otherwise in a position which would be rendered perilous by the motion of the car when it is again put in motion."

See, also, *Highland Avenue, etc., R. Co.* v. *Burt*, 92 Ala. 291 (9 South. 410, 13 L. R. A. 95); *Railroad* v. *Mitchell*, 98 Tenn. 31 (40 S. W. 72); *Memphis Street Ry. Co.* v. *Shaw*, 110 Tenn. 467 (75 S. W. 713); *Medler* v. *Railroad Co.*, 126 N. Y. 669 (27 N. E. 854); s. c. (City Ct. Brook.) 12 N. Y. Supp. 930; *Finn* v. *Railway Co.*, 86 Mich. 74 (48 N. W. 696). The following instructions to a jury were approved in *Gilbert* v. *Railway Co.*, 160 Mass. 403 (36 N. E. 60):

"(1) A common carrier is bound to delay at a station or stopping place only a reasonable length of time for the purpose of allowing passengers to alight, unless those in charge know or have reason to know that some passenger has not got off, and is desiring to do so.

"(2) Passengers on a street car, when at their place of destination, should leave the car with reasonable dispatch, and after the car has stopped a reasonable time for passengers to get off, and as soon as all passengers destined for a particular place, or intending to get off there, have apparently left, and the conductor has no notice that any one else is trying to get off, then the conductor may properly start his car.

"(3) If the car has stopped a reasonable time, and the plaintiff did not step from the car until after the car had started, and was not at the time of starting the car apparently in the act of leaving it, and the conductor did not

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know, or have any notice, or have reason to know, that the plaintiff was intending or desiring to get off there, then there was no negligence on his part in starting the car.

"(4) If the jury find that the car had waited a reasonable length of time for passengers to alight, and that the plaintiff delayed and was not apparently in the act of leaving the car when the bell was given for the car to start, and the conductor had no notice or knowledge of the plaintiff's intention or desire to get off, then there was no negligence in starting the car.

"5. The conductor was not bound to know that every passenger had left the car that was intending to leave it at that place, in the absence of any sign of such intention, and if, after waiting a reasonable time, he took reasonable means to see whether passengers were at the time leaving the car, and no one appeared to be leaving it, and the conductor did not know, or have any reason to know, that the plaintiff was intending to get off, there was no negligence in starting the car."

No different rule should be applied when passengers are entering the car. *Kinkade* v. *Railroad Co.*, 9 Misc. Rep. 273 (29 N. Y. Supp. 747); *Dean* v. *Railroad Co.*, 34 App. Div. 220 (54 N. Y. Supp. 490); *Dudley* v. *Railway Co.* (C. C.), 73 Fed. 128; *Smith* v. *Detroit United Railway*, 145 Mich. 629 (108 N. W. 1024). In *Dudley* v. *Railway Co.*, *supra*, it was said:

"It was the duty of the conductor, before giving the signal to the gripman, to look around, and to have seen that all passengers to take passage at that place were safely on board; and failure in the performance of this duty cannot be excused by the fact that the conductor did not actually see the plaintiff."

We think the judgment should not be reversed because of the instructions which were given or because defendant's requests were refused. The instructions do not incorrectly state the applicable rule of law.

They do not, as of course they should not, state, or imply, that defendant was an insurer of plaintiff's safety, or that the conductor was bound, at the peril of defendant, to know that no one was entering any of the cars when they were started. The court might very properly

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have incorporated in the charge reference to length of time the cars were stationary, to the rather unusual conduct of plaintiff, and we think it would have been error to refuse to do so if requested.

When street cars have stopped for such a time that any one capable of entering, or of alighting, with reasonable celerity, ought to have done so, the conductor, in the absence of notice to the contrary, may rely somewhat upon the presumption that the purpose of bringing the cars to a stop is accomplished. It is a matter of common knowledge, too, that a conductor would be less likely to notice such a change of position as plaintiff claims he made than the actions of those leaving or entering cars in the ordinary manner. The court was not asked to amplify his instructions in this respect, nor is the failure to do so assigned as error.

We find no merit in the assignments based upon rulings admitting and rejecting testimony.

We are impressed that for some reason, or reasons, a verdict opposed to the great weight of the evidence was returned by the jury. Whether this was due to the failure of the court to amplify the charge in the manner herein indicated, or to the inflammatory and improper arguments of counsel for plaintiff, some of which have been set out, or to both, it is, of course, impossible to determine.

Counsel for defendant made such objections to the argument referred to that the court gave it attention and stated a view of the law opposed to the one presented by counsel. But neither at that point, nor in the charge, was the jury told to consider only the law stated by the court. Counsel did not submit to the ruling of the court. On the contrary. And what was said might well have been treated by the jury as indicating that counsel's views were as likely to be right as those expressed by the court. The argument was calculated, and apparently intended, to do harm to the defendant and to induce the jury to determine the issue without regard to the limitations imposed

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by the court in the charge. If it had not been made, we should have hesitated, and probably refused, to set aside the verdict.

Under the circumstances, we are impressed that it is our duty to reverse the judgment and order a new trial. It is so ordered.

STEERE, MOORE, BLAIR, and STONE, JJ., concurred with OSTRANDER, C. J.

MCALVAY and BROOKE, JJ., concurred in the result.

BIRD, J., did not sit.

WENZEL *v.* KIERUJ.

1. CONTRACTS—BUILDING CONTRACTS—CONSTRUCTION.
   Under the provisions of a contract to install heating apparatus in a church as specified therein, plaintiff to cover all pipes underground so as to protect them from freezing, he was not bound to cover pipes under the church but not underground, and work done in protecting such pipes at the request of the architect was an extra.
2. SAME—TRIAL.
   The construction of the writing was for the court, not the jury.
3. SAME—PAROL EVIDENCE—PRIOR NEGOTIATIONS.
   Parol agreements and statements made prior to the execution of the written instrument could not be shown to vary its terms.
4. SAME—SUBSEQUENT AGREEMENT.
   But plaintiff was entitled to have submitted to the jury his claim, which was supported by testimony, that defendant and its architect authorized him to protect the pipes after the execution of the contract, and agreed to the charge therefor as an extra.

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Error to Wayne; Rohnert, J. Submitted November 7, 1911. (Docket No. 57.) Decided December 29, 1911.

Assumpsit in justice's court by Paul Wenzel against Felix F. Kieruj for work done for defendant. On appeal to the circuit court the cause was tried by a jury. Judgment for defendant. Plaintiff brings error. Reversed.

May & Dingeman, for appellant.

McIntyre & Wheeler, for appellee.

STONE, J. This is an action of assumpsit, in which the plaintiff seeks to recover the sum of $135 for alleged extra work for covering the steam pipes under St. Francis Church, in the city of Detroit. The plaintiff has for many years been engaged in the business of plumbing and steam fitting. In 1904, the congregation of said church determined to erect a church and school, and Kastler & Hunter, architects, were selected to prepare plans and specifications, and to ask for and receive bids for the work. Among the bids received was the one from the plaintiff for steam fitting, which was accepted, and a contract was signed by the parties. The plaintiff claimed and testified that the contract was left in possession of Mr. Kastler, who was the supervising architect in control of the work, and that plaintiff never had a copy. It is the claim of the plaintiff that under the specifications on which his bid was figured there was no obligation on his part to cover the steam pipes under the church with asbestos. He testified that Kastler called him up and told him to cover these pipes (which were under the church, but not under the ground), and, when told by the plaintiff that it would be extra, Kastler said:

"Go ahead and do it, and we will take the matter up later on. Go on with the work; they have got to be covered."

Plaintiff claimed further, and offered testimony tending to show, that both Kastler and the defendant stated that

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the pipes would have to be covered, and that the work would be paid for as extra. This is denied by the defendant, who contended that the covering of these pipes under the church was included in the original contract, and that the work should not be allowed as an extra. If there is liability, it was conceded that the defendant was the proper party to be sued.

The testimony tended to show that the contract between the parties was lost, but the specifications (Exhibit A) read in part as follows:

"Specifications for Heating St. Francis Church.

"Radiators: The church will be heated with radiators in the sanctuary, sacristy, vestibules and choir, the house and boiler house with radiators, to heat the church 60 degrees in zero weather; remainder of radiators throughout house and boiler house to be heated to 70 degrees in zero weather.

"Pipes Underground: To be thoroughly protected from freezing must be deep enough to be boxed in wooden boxes 3′ larger than pipe, pipes must be covered with magnesia and felt, enough to afford good service. The putting in of heating apparatus must be done complete in every respect by the heating contractor; all necessary tools for boiler, etc."

"The covering pipes underground may be done with crock of sufficient sizes."

The undisputed evidence was that the work sued for was worth $135. The case was submitted to a jury by the trial judge, and resulted in a verdict and judgment for the defendant. The plaintiff has brought the case here on writ of error, and the 10 assignments of error all relate to the charge of the court.

The appellant states that there are really two questions in the case: (1) Did the original contract and the specifications require the plaintiff to cover with asbestos the pipes under the church? (2) If not, did the parties subsequently make an additional contract covering this work?

Counsel for appellant urge that the first question is entirely one of construction; that the contract which the

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parties signed must be held to include the specifications for the work, and therefore must be construed together; that, in the absence of any ambiguity, it was the duty of the court to construe these instruments, and to instruct the jury as to their extent and governing force, citing *Tompkins* v. *Gardner & Spry Co.*, 69 Mich. 58 (37 N. W. 43); *Douglass* v. *Paine*, 141 Mich. 485 (104 N. W. 781).

It is further claimed that in considering the terms of the heating specifications, and applying to the words their plain and ordinary meaning, there is nothing that obliged the plaintiff to cover the steam pipes *under the church*, the obligation being to cover the pipes *underground* to prevent their freezing; and there is no claim that he failed to do the latter.

It is conceded that the second question was one of fact, in which the plaintiff claimed a subsequent oral contract, authorizing him to cover the pipes and agreeing to pay him for the work as an extra; and the plaintiff claims that he was entitled to go to the jury on the question, under proper instructions. The appellant urges that the trial judge ignored this phase of the controversy, and failed to present the question to the jury.

The following is the substance of the charge, and error is assigned on the portions numbered and inclosed in brackets:

"1. [If you find that it was mutually understood between the parties, before the contract was signed, that the specification included the covering of those pipes, then he is not entitled to a verdict, and your verdict must be for the defendant, no cause of action.]

"2. [If you find that in the discussion from the parties, or from the circumstances as they appear prior to the time of the execution of the contract, that it was mutually understood between the parties that the covering of the pipes was within the specifications, then you will consider whether or not the plaintiff was told by Mr. Kastler, before he covered the pipes, that it was included in the contract, and was not to be an extra. If you find that he was told so, and did the work with the statement

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that it was, to be within the contract, then your verdict will be for the defendant, no cause of action.]

"3. [But, if you find from the testimony that he was not told, then it is up to you to determine whether or not, within the terms of the contract, it became necessary that those pipes should be covered in order to make it the guaranty which the plaintiff embodied as a part of his contract.]

"The guaranties in the contract were that the radiation should be what was specified in the contract, and it was so understood that there should be that much radiation, and the pipes covered by the plaintiff, for which he sues. If you find that that radiation specified would not heat the church in accordance with his guaranty, namely, heat the church to a temperature of 60 degrees and the house and boiler room 70 degrees when the temperature was zero outside, then it would be necessary for the plaintiff, either to add additional radiation in the building, or else to provide, by covering the pipes, or by other means, sufficient protection to the steam to prevent condensation, and to bring the radiation in the building up to the amount required. If you find that it became necessary to cover those pipes in order to bring up the radiation in the church to the amount specified in the contract, it became necessary to cover those pipes for that purpose, the plaintiff cannot recover.

"4. [Again, if it was guaranteed in the contract that the system would carry radiation in the building, such as would heat all of the premises to a temperature of 70 degrees when the temperature outside was 10 degrees below zero, and if you find that that system as installed, taking it for granted that you find the covering was not specified in the contract or specifications, if you find that the system as installed would not carry a radiation in the building to a degree of temperature of 70 degrees when the temperature outside was 10 degrees below zero, without covering the pipes, then it became necessary for them to be covered, and he is not entitled to recover.]

"If you find that the plaintiff is entitled to recover, you will allow him a reasonable charge for the work, and add thereto interest from January 1, 1905, 4 years and 2½ months, would be 21 per cent., in addition to the amount you find. If you find for the defendant, it is no cause of action. You will understand, gentlemen, that there are three propositions which you are to consider.

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"5. [If you find in favor of the defendant on any one of them, your verdict must be for the defendant, no cause of action. The first one is, Was it contemplated or understood mutually between the parties, before the contract was signed, that they were to cover these pipes, and that they were included within the terms of the contract?]

"If it was so understood, then the plaintiff cannot recover. The second proposition is, Was it stated before the pipes were covered that this work was to be part of the work to be done as a part of the contract, and would not be an extra, and did the plaintiff do it under that statement?

"6. [And the third question is, Was it necessary that these pipes be covered in order that the radiation guaranteed by the contract should be sustained? If you find that it was necessary to cover these pipes in order to give the necessary radiation within the terms of the contract, then the plaintiff cannot recover.]

"7. [As I stated, the guaranties in that contract required the plaintiff to install a plant with radiation provided for in the radiators; that it should carry a heat of 60 degrees in the church and 70 degrees in the other buildings when the temperature was zero outside. Also that the system should be such that sufficient radiation could be added by the installing of large radiators, so that the system would carry a temperature of the degrees specified in all places to be heated when the temperature outside was 10 degrees below zero. If it was necessary to meet that that these pipes should be covered, it became the duty of the plaintiff to cover them. If you find for the plaintiff on that proposition, it will be necessary for you to also find for him on the other proposition. I hope I make myself clear.]

"*Mr. May:* I should like to say that I think the jury should be instructed that, as a matter of economy, if this was put on as a matter of economy, that it would not preclude us from recovering.

"*The Court:* 8. [If the guaranty as to radiation could be made without crowding the boiler, that was all that was necessary; you cannot allow them to demand anything which was not reasonable. Of course, experience teaches us that in cold weather you will have to have more fire in the furnace, but the guaranty is expected to be fulfilled without any unreasonable crowding of the boiler; in other words, that guaranty should be fulfilled by a reasonable and ordinary use of the boiler, such as would be

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expected under ordinary circumstances in the various degrees of weather when the boiler is in use. I think that covers the proposition.]"

We are of opinion that the heating specifications should have been construed by the court, and that the jury should have been instructed as to their meaning and import, and that they did not embrace the work sued for in this action.

Error is assigned upon the following part of the charge:

"If you find that it was mutually understood between the parties, before the contract was signed, that the specification included the covering of those pipes, then he is not entitled to a verdict, and your verdict must be for the defendant, no cause of action."

Similar language was used in other parts of the charge, upon which error is assigned. This part of the charge is rendered very significant, because Mr. Kastler, the architect, testified to conversations with the plaintiff prior to the making of the contract, as follows:

"They were not mentioned in the specifications. He asked me if they would have to cover them, and I said: 'Certainly; it is exposed to the weather.' That is before he put in his figure. He had that conversation in my office when he was figuring on the work. * * * I told him it was a part of his contract; it was so understood before the contract was signed."

This part of the charge was erroneous. We understand the rule of law to be that prior mutual understandings of the parties are unimportant, when they have signed a contract covering the subject-matter, since the latter includes and covers all such prior negotiations and agreements. In *Rumely & Co.* v. *Emmons*, 85 Mich. 517 (48 N. W. 637), this court said:

"It is a well-settled rule of law that, when the parties have reduced their contract to writing, it must be presumed that the writing contains the whole of the agreement, and all parol contemporaneous agreements are merged therein."

See, also, *Cook* v. *First Nat. Bank*, 90 Mich. 214 (51 N. W. 206); *Johnson* v. *Bratton*, 112 Mich. 323 (70 N.

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W. 1021). The general rule is that you cannot import into a written agreement a prior parol agreement which alters the terms or legal effect of the written agreement.

We think that the plaintiff was entitled to have fully submitted to the jury his claim, to wit, that, by a subsequent oral contract with the architect and the defendant, he was authorized to cover the pipes and charge for the same as an extra, and that the court failed to so submit it.

We have pointed out the errors which we think were prejudicial.

The judgment of the circuit court is reversed, and a new trial granted.

MOORE, STEERE, and BROOKE, JJ., concurred with STONE, J.

OSTRANDER, C. J. I concur upon the last point, namely, that plaintiff was entitled to have his claim submitted to the jury.

MORSE v. DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.

1. EVIDENCE—INFANTS—MORTALITY TABLES.
   It was reversible error to admit the mortality tables in evidence, in an action under the survival act for the wrongful death of an infant 27 months old, whose expectancy did not appear from the tables: and the evidence was not admissible to show the probable duration of his life after he should arrive at majority.

2. RAILROADS—NEGLIGENCE.
   Evidence that defendant's engineer, seeing the infant on the track soon enough to have stopped his train, did not do so,

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merely sounding his whistle and continuing until he was too near to avoid an accident, had a tendency to show negligence justifying a verdict for plaintiff.[1]

Error to Ingham; Wiest, J. Submitted November 9, 1911. (Docket No. 77.) Decided December 29, 1911.

Case by Glenn Morse, administrator of the estate of Albert J. Morse, deceased, against the Detroit, Grand Haven & Milwaukee Railway Company for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Harrison Geer, for appellant.

Odell Chapman, for appellee.

STEERE, J. Albert J. Morse, a child 27 months of age, was struck and fatally injured by one of defendant's freight trains near Comstock street crossing in Corunna, Mich., in the afternoon of July 16, 1904. He lived about 24 hours after the accident. His father, Glenn Morse, brought this action as administrator of his deceased son to recover damages under the so-called survival act (3 Comp. Laws, § 10117).

Deceased's parents resided 165 feet south of the crossing where he was killed, in a house which stood 55 feet east of Comstock street. On the afternoon of the accident, deceased's mother had gone up town on some errand, and left the child in care of his father, who was lame as the result of an injury sustained while working as a brakeman on the Soo Line Railway, and walked with difficulty, generally using a cane. Towards evening, the father, going to a field back of the house to milk a cow, took the child with him. About the time the father finished milking, the child started ahead toward the house through a patch of corn, and was hidden from sight. The father, being lame, walked slowly, but reached the house a short

[1] Care required of railroad company to prevent injuring small children upon the track, see notes in 25 L. R. A. 784; 6 L. R. A. (N. S.) 288.

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time after the child left him, and found he was not there. He looked around the house for him, and up and down the street. Looking toward the crossing of the railroad, he finally discovered him on defendant's track. A train was just coming, and the father started as hurriedly as he could for the child, but, before reaching him, the child was struck by the train, receiving injuries which resulted in his death. The declaration is in proper legal form under the survival act, and, briefly stated, charges defendant with gross negligence in the particular that the engineer saw deceased, a child of tender years, alone upon the track far enough away to have stopped the train before reaching him, and should have done so, but, instead, only sounded the danger signals to frighten him off the track, not attempting to stop the train until it was too late. Defendant pleaded the general issue. The case was tried before a jury.

At the conclusion of the testimony, defendant's counsel requested the court to direct a verdict for the defense on the ground that there was no evidence from which the jury could find defendant guilty of gross negligence, which was refused. A verdict was rendered by the jury in favor of plaintiff for the sum of $3,850. A motion was thereupon made for a new trial, and denied on condition that plaintiff remit the sum of $850. This was done, whereupon the court rendered judgment for $3,000 against defendant.

The record contained numerous allegations of error, but, in the view taken of the case by this court, it is thought only two require consideration at this time: *First.* The admission of the mortality table in evidence against defendant's objection. *Second.* The refusal of the court to grant the request that a verdict be directed for defendant.

The record shows that counsel for plaintiff, against objection, was permitted to introduce in evidence the mortality table under section 7220, 2 Comp. Laws, for the purpose of showing the probability of life on the part of the child after arriving at the age of 21 years. In *Raj-*

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nowski v. *Railroad Co.*, 74 Mich. 21 (41 N. W. 847), a case brought by the mother as administratrix of a child alleged to have been killed through defendant's negligence, the court says:

"Counsel for plaintiff, against defendant's objection, were permitted to introduce in evidence before the jury the mortality table. * * * This was error, for the reason that the table gives no expectancy of life for any age under 10 years. The plaintiff's intestate was but five years of age, and what pertinent use could be made of the table it is impossible to see. Those at all versed in the science of longevity know that the chances of an infant of the age of five to reach a remote period of existence are far less than when he arrives at ten. Few, if any, insurance companies, take risks upon lives under ten years of age."

Infant mortality is a matter of common knowledge. It follows that an infant of 27 months has yet fewer chances to reach a remote period of existence than when he arrives at ten. It was the duty of the jury to estimate deceased's expectancy from the age of 27 months, not 10 years or 21 years. In disposing of the motion for a new trial, the court took note of this error, and stated that the admission of such table only bore upon the amount of damages, and, inasmuch as it gave the plaintiff's intestate a greater expectancy than it would had the consideration of the jury been limited to his actual age at the time of his death, substantial justice could be done by reducing the award made, and so required the plaintiff to remit $850. While this might be a fair and rational disposition of the objection if within the power of the court, it was, nevertheless, invading the province of the jury, and amounted to a participation on the part of the court in the deliberations of the jury when passing upon questions of fact. It is impossible for any court to judge what effect the mortality table had upon the deliberations of the jury. This table, compared with what is called the Carlisle mortality table, shows that the jury may have been misled as to the child's expectancy to the extent of about 12 years. Whether such was

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or was not the case no one can say. Under the decision referred to, admission of the mortality table against objection was reversible error.

Under the second allegation of error, before mentioned, it is strenuously urged by counsel for defendant that there is no evidence of gross negligence in the case which justifies a submission of that question to the jury. Inasmuch as there must be a reversal of this case for reasons stated, it seems incumbent upon us to review this allegation of error, but it is not deemed advisable to dwell upon the testimony at this time, or emphasize the evidence of any particular witness by calling attention to it. Suffice it to say that we are all agreed there is competent testimony in the case tending to show that the engineer should have seen, and in fact did see, the child on the track soon enough to have stopped the train before reaching him, and plainly enough to see and realize that he was a small child, unattended, and too young to appreciate the danger, or the meaning of the alarm given, and that, instead of checking his train so that he had it under control, he only sounded the danger signals and recklessly kept on until it was impossible to stop before striking the child.

On the other hand, there is also competent testimony controverting this, and tending to show that the instant the engineer, who was faithfully attending to his duties, discovered the child upon the track, he applied the emergency brake, shut off the steam, gave the danger signals, and made every effort within his power to stop the train. It is not proper to here discuss the significance or weight of such evidence further than to hold that it presents an irreconcilable conflict of competent testimony on a vital issue, which it is within the province of the jury to decide under proper instructions.

For the error heretofore pointed out, the case is reversed, and a new trial granted.

OSTRANDER, C. J., and MOORE, BROOKE, and STONE, JJ., concurred.

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CREEN *v.* MICHIGAN CENTRAL RAILROAD CO.

1. PLEADING—NEGLIGENCE—RAILROADS—COUNTS.
   Plaintiff may set out his cause of action in different counts of his declaration, with as many different but consistent averments of acts of negligence causing the injury, as he sees fit, in order to meet possible evidence as it may develop on the trial.

2. SAME—DEMURRER.
   On special demurrer to the declaration it must be considered more critically than after a plea on objection raised at the trial.

3. SAME—DUPLICITY.
   In order to avoid the objection of duplicity, a declaration should not join allegations of common law and statutory duties in one count.

4. SAME—COUNTS—JOINDER.
   Averments of related facts not contradictory, logically connected with a single injury and capable of jointly or separately contributing to or causing it, may be joined in one count.

5. SAME—DECLARATION—PERSONAL INJURIES.
   There was no sufficient ground of objection to a declaration for the wrongful death of plaintiff's intestate, caused by the explosion of a locomotive boiler, where the pleading charged in one count in separately numbered paragraphs that it was defendant's duty: (1) to have provided a boiler of sufficient strength, etc., to withstand the expansive force of the steam; (2) to have employed inspectors and others who were competent to examine and to keep the appliances connected therewith in safe condition; (3) to have inspected the boiler and its several parts; (4) to have had the water glass cleaned and properly prepared; (5) to have had the inspectors inspect the bolts, rivets, joints, etc.; (6) to have repaired the burned and warped iron of the fire box and water space; and where breaches of said duties were averred in corresponding paragraphs, separate and numbered.

Certiorari to Crawford; Sharpe, J. Submitted Novem-

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ber 10, 1911. (Docket No. 89.) Decided December 29, 1911.

Case by Anna E. Creen, administratrix of the estate of John T. Creen, deceased, against the Michigan Central Railroad Company for the unlawful killing of plaintiff's decedent. An order overruling a demurrer to plaintiff's declaration is reviewed by defendant on writ of certiorari. Affirmed.

George L. Alexander (*Humphrey & Grant*, of counsel), for appellant.

Hall, Defoe & Henry, for appellee.

STEERE, J. This is an action brought by plaintiff as administratrix of her deceased husband, John T. Creen, to recover compensation for his death, which was caused by the explosion of a boiler of one of defendant's locomotives on which he was engineer.

The question before us is the sufficiency and legality of plaintiff's declaration, to which defendant has filed a special demurrer. This declaration, as an entirety, is skillfully drawn, containing, in proper arrangement and apt phraseology, all the requisite parts of a declaration, according to the rules of pleading at common law. It is composed of two counts, each of which charges a cause of action, sounding in negligence, by sufficient averments of duty, breach of duty, and resultant damage. Only one accident and one injury are stated. They are the same in each count, being the explosion of the locomotive boiler and consequent death of plaintiff's intestate; but the pleader has stated in the first count six, and in the second count seven, separate breaches of duty and acts of negligence which caused the explosion. Each duty and breach of duty is stated separately in separately numbered paragraphs.

In the first count the duties are stated as follows:

"(1) To have provided such engine with a water space

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constructed of boiler iron of sufficient strength, and so bolted, riveted, and fastened together as to withstand the expansive force of such confined steam required to propel said train, and to have kept and maintained the same in reasonable repair.

"(2) To have employed inspectors, repairers, boiler washers, and hostlers who were reasonably competent to examine and inspect the water space of such engine and the openings of said check valve and water glass, with reference to the condition of repair thereof, and in regard to matter and scale formed therein, and to have caused such examination and inspection of said space and openings to have been made by inspectors, repairers, boiler washers, and hostlers, so competent, at reasonable times and whenever necessary, and before delivery of said engine to intestate for use as a locomotive.

"(3) To have caused the inspectors, repairers, boiler washers, and hostlers so employed by it to examine and inspect the water space of such engine and the openings of said check valve and water glass to ascertain the condition thereof in regard to earth and scale therein, at reasonable times, and before the delivery of said engine to intestate for use as a locomotive.

"(4) To have caused the water space of such engine and the openings of said check valve and water glass to be washed out and cleaned by its said inspectors, repairers, boiler washers, and hostlers and such matter and scale removed from the interior thereof before the delivery of said engine to intestate for use as a locomotive.

"(5) To have caused the inspectors, repairers, boiler washers, and hostlers so employed by it to examine and inspect the fire box and water space of said engine, to ascertain the condition thereof in regard to the uneven expansion, warped, and burned condition of the iron comprising the same, and loosened and broken stay bolts and rivets therein, before the delivery of said engine to intestate for use as a locomotive.

"(6) To have caused the fire box and water space of said engine to be repaired by the removal of the iron comprising the same that was so unevenly expanded, warped, and burned, and by repairing the same with boiler iron that was suitable for such use, and by replacing the stay bolts and rivets therein that were loosened and broken, before the delivery of said engine to intestate for use as a locomotive."

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Said count further alleges, in six separate paragraphs, correspondingly numbered, a failure to perform each one of these several and distinct duties. There is no allegation that said acts of negligence concurred to produce the injury complained of.

The second count is claimed to be based upon Act No. 104 of the Public Acts of 1909, which makes a defendant liable for the negligent acts of its employés. This count states, in substantially the same language, the six duties and breaches of duty found in the first count, imputing them to "defendant and its several officers, agents and employés," and, in addition thereto, also alleges, as a seventh ground, the duty of the fireman to test and examine the water glass to ascertain the amount of water in the boiler, and to keep the same properly filled, with a corresponding averment of a breach of that duty, charging defendant as liable therefor.

Defendant's demurrer is special, full, and complete, specifically traversing each of the several matters complained of. Its import is that the several, separate, and distinct duties and breaches of duties found grouped together in the separate counts render them so multifarious and duplicitous as to violate all rules of pleading, thereby defeating the office and purpose for which a declaration is designed, which is to apprise the defendant of the specific negligence on the part of the defendant which it is claimed caused the accident, and which plaintiff proposes to prove in support of the action brought. The gist of said demurrer is contained in its concluding paragraph, which is as follows:

"Both of these counts are insufficient in law, in that they do not apprise the defendant whether the accident was caused by reason of defective construction of the engine, defective material in the original construction, want of competent inspectors, failure to inspect, failure to repair, failure to remove scale, or failure to keep a sufficient supply of water in the boiler, nor do they give to defendant sufficient information to enable it to intelligently and properly prepare to meet the issues thrust upon it by this

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sweeping declaration of duties and neglect of duties: These counts being so drawn as to encompass all possible phases and contingencies that the plaintiff may be able to develop on the trial is a mere fishing expedition without apprising the defendant upon what specific acts or omissions the plaintiff intends to rely so as to enable it to be prepared to meet them, and do not fill the requirements and provisions of a proper pleading in that regard."

The charge that this declaration is a fishing expedition imputes uncertainty and a possible expenditure of time and effort without results, but the suggested uncertainty relates rather to what acts of negligence can be proven than to what are alleged. Fishing is sometimes legitimate, even in the troubled waters of a negligence case.

It is settled beyond debate that a plaintiff may set out his cause of action in different counts of his declaration, with as many different averments of acts of negligence causing the one injury as he sees fit, provided they are not inconsistent, in order to meet possible evidence as it may first fully develop on the trial. As an aid to that end, we have a recent statute which authorizes a litigant to call as witnesses the opposite party and his employés, and cross-examine them, without being bound by their answers. Each of the several charges objected to might unquestionably be set forth in the declaration in separate counts. The serious question is whether or not they can be embodied in a single count. It is true that the practice has become somewhat common in this State to allege in a single count separate and distinct acts of negligence on the part of the defendant, any one of which would be sufficient to sustain a verdict, and many declarations of that character, some of which closely resemble the one under consideration, have passed through this court, but they were either not objected to or the objections raised have, as a rule, been after a plea had been interposed, the court disposing of them on the ground that they had been waived by pleading, and could only be considered on special demurrer. The matter now being before the court

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on demurrer, this declaration must be considered more critically than if defendant had gone to trial on a plea to the merits. The serious import of defendant's demurrer is that the counts objected to are duplicitous and multifarious.

It is a generally recognized rule of pleading that breaches of duty imposed by the common law and breaches of statutory duty, while chargeable in a single action, should be embodied in separate counts. The majority of cases, in which a count in the declaration alleging two or more acts of negligence capable of contributing to a single injury is held duplicitous, are cases where statutory duties and common-law duties are charged in the same count. That objection has been obviated by the pleader in this case. We find much conflict of authority as to the legality of charging in one count of a declaration to recover damages for personal injuries two or more acts of negligence on the part of the defendant, which, together or separately considered, might have caused said injury. Many cases from different States well in point have been cited by both sides in support of their respective contentions. These cannot be reconciled.

It is the claim of defendant that most of the cases cited by plaintiff are from States where a code has been adopted and the strict rules of pleading abandoned. Such is naturally the case, for the reason that most of our sister States have adopted codes; but we find the decisions from code States are often in marked conflict. The strongest decision we find in support of defendant's contention is from a code State—*Highland Avenue, etc., R. Co.* v. *Dusenberry*, 94 Ala. 413 (10 South. 274)—which cannot be reconciled with *Flynn* v. *Staples*, 34 App. D. C. 92 (27 L. R. A. [N. S.] 792), *Boireau* v. *Rhode Island Co.* (C. C.), 169 Fed. 1015, *Southern R. Co.* v. *Blanford*, 105 Va. 373 (54 S. E. 1), *Seaboard Air Line* v. *Rentz*, 60 Fla. 449 (54 South. 20), *New York, etc., R. Co.* v. *Robbins*, 38 Ind. App. 172 (76 N. E. 804), and *J. W. Bishop Co.* v. *Shelhorse*, 141 Fed. 643, 72 C. C. A. 337.

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"All the different acts of negligence on the part of defendant which caused the injury may be alleged in one paragraph." 29 Cyc. p. 565.

It is said in Black on Proof and Pleadings in Accident Cases, p. 200:

"In most of the United States, the common-law system of pleading has been abolished and the code substituted, by which the cause of action is stated in a complaint or petition, and not, as at common law, in a declaration, yet some of the States still adhere to the common law, and, under the liberal practice now allowed in amending the pleadings, the old common-law system is no more technical than the code."

While this State has no code and the common-law form of pleading obtains, special pleadings have been abolished, and numerous innovations and modifications which formerly would not have been tolerated have been introduced, tending to relax technical rules and simplify the practice. Many different causes of action may now be joined in one declaration, where it was formerly forbidden. Assumpsit may be brought on waiver of tort and the action joined in other causes maintainable in assumpsit. In an action for destruction of one's business and credit, growing out of the breach of a single contract, a series of wrongful acts, aimed at a single result, may be joined in one count. *Oliver* v. *Perkins*, 92 Mich. 304 (52 N. W. 609). It has been held that our practice does not encourage needless repetition of allegations. A multitude of words is not necessary in a declaration, though reasonable certainty is required. Extreme niceties and technical exactness in form is not favored, and many other authoritative rulings and suggestions along the same lines, familiar to the profession, clearly indicate the tendency to eliminate the ultra refinements and technicalities of old forms of common-law pleading.

It was said in *Douglas* v. *Marsh*, 141 Mich. 213 (104 N. W. 625):

"It would have been better pleading to set out the two

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possible theories in separate counts, but, unless the one averment negatives the other, the objection of duplicity was not good."

This might be regarded as dictum, as the defendant had pleaded to the declaration in that case, but it was, at least, an intimation of the tendency to relax old technical rules, for, under them, the objection of duplicity would have been good.

It is material to note in this connection that a plea of the general issue, which would be fatally defective for duplicity and multifariousness under the old, strict rules of pleading, is now a denial of all material facts and allegations contained in a plaintiff's declaration. In the States where, even under a code, a plea or answer must separately traverse and meet the averments in plaintiff's declaration or complaint, there is more substantial reason for stricter rules against cumulative charges and duplicity of allegations in a single count. In this State a plea of the general issue is sufficient pleading to meet all charges of negligence in plaintiff's declaration, whether set forth in two counts or many. Not necessarily being contradictory, or incompatible, if each was set out in a separate count, they would not be demurrable, and would be no more definite and specific. In the form they now appear, the duties and breaches of duty averred are as distinctly stated and separately numbered, available for specific objections on the trial of the cause, and for separate treatment by the court in ruling on evidence, and for instructing the jury, as though they were in separate counts. It is the claim of this defendant that, if this pleading is sustained, counts can be filled with averments of every imaginable act of negligence which might possibly cause an injury, until they became so multifarious and uncertain as to amount to nothing more than a general charge of negligence, giving defendant no definite information as to what it must prepare to meet.

When a declaration fails to advise the defendant with reasonable certainty, according to the circumstances of

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the case, of the facts upon which plaintiff proposes to rely, and will seek to prove, it can not be sustained. To a degree, uncertainty necessarily exists in every case where a declaration contains more than one count, and where an accident resulting in injury is attributable to more than one cause; but, if the averments are of related facts, not contradictory, logically connected with a single injury and capable of jointly or separately contributing to or causing it, we think it proper to allege and prove them in one action. In this case we see no useful purpose to be served by requiring that they be in separate counts.

The gravamen of the case is the death of plaintiff's intestate, caused by explosion of the boiler of one of defendant's locomotives, which, owing to defendant's negligence, was not of sufficiently strong construction and not properly cared for. Proof of the accident is not proof of negligence. To recover, plaintiff must not only prove the injury, but establish by a preponderance of competent evidence the particular acts of negligence claimed to have caused it. The defendant, being the owner, and having the possession, care, and control of the locomotive in question, is presumed to have as good, if not better, means of information as to its construction and condition as has the plaintiff. Its construction and condition at the time of the explosion are the condensed issues in the case.

The duties and breach of duties alleged in each count of the declaration are not inconsistent, distinct, or disconnected causes of action, foreign to each other, but related, coexistent acts tending to effect a single, complete result. Under our rules of pleading a single, short plea of the general issue meets and covers them. The following language in *Flynn* v. *Staples*, *supra*, is peculiarly applicable:

"In this case either both or neither of the alleged acts of negligence may have produced the injury complained of. It is clear that their joint consideration is indispensable to a determination of appellant's right. To compel a separation of them would impose an unreasonable re-

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striction upon her, and violate the spirit of all rules of pleading. Both alleged acts of negligence related to substantially the same thing. They are so closely connected in the pleading that the taking away of one must inevitably result in the impairment of the other. In other words, it is impossible to say, without consideration of all the facts, that they did not unitedly produce a common result, and a jury might so find. There was but one result, no matter what produced it; and these acts must be considered, not as separate grievances, but as related acts, whose united or cumulative effect may have produced that result; that is, as two different acts, not as two different counts."

We therefore are of the opinion that the order overruling the demurrer should be affirmed.

OSTRANDER, C. J., and MOORE, BROOKE, and STONE, JJ., concurred.

KOEHLER v. ABEY.

1. EVIDENCE—BOOKS—MEMORANDA—WITNESSES.
   A writing or memorandum used to refresh the recollection of a witness is not thereafter admissible as further substantive evidence of the fact: but when the witness has no recollection of the matters shown by the memorandum it is competent evidence if properly proved.

2. SAME.
   Whether the truth of the memorandum was sufficiently guaranteed by the witness, who gave evidence tending to show that he may not have performed the duty which the memorandum evidenced, was a question for the court, and was correctly determined by rejecting the memorandum.

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3. SAME—CORROBORATIVE EVIDENCE—OFFICIAL ACTION.
In an action for personal injuries, alleged to have been caused by defendant's failure to guard the knives of a jointer, as required by an order of one of the State factory inspectors, who kept a memorandum of the order, but was unable to prove the truth thereof sufficiently to admit it in evidence, the court erred in rejecting evidence of the routine duties, and the custom of the witness to keep memoranda of his orders, and as to his habit of making false or correct entries.

4. SAME—REPORTS OF OFFICERS—LABOR COMMISSIONER.
The court erred in excluding from the evidence a report of the State commissioner of labor, required to be made by the provisions of statute, showing that the witness left an order at defendant's factory to guard the machine; but the report was not competent evidence that such order was, in fact, made, it was evidence only that the memorandum was authentic, and was made in the discharge of the inspector's official duty.

Error to Wayne; Murfin, J. Submitted November 9, 1911. (Docket No. 83.) Decided December 29, 1911.

Case by Frederick Koehler against Daniel W. Abey and Edwin C. Palmer, copartners as the Detroit Wood Pulley Company, for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Clarence P. Milligan, for appellant.

Walker & Spalding, for appellees.

The plaintiff was employed by defendant in August, 1907, at work upon a planer or jointer. He was injured, and ascribes his injury to the fact that the machine was not guarded. He alleges in his declaration the duty of defendant to guard and protect the jointer knives, the further duty to comply with the statute requiring the safeguarding of dangerous machinery, and the further duty to comply with an express order of the factory inspector given on or about June 1, 1905. He alleges a violation of each of these alleged duties. The statute (Act No. 113, Pub. Acts 1901; see 2 Comp. Laws, chap.

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137) requires an annual inspection of factories and manufacturing establishments by the commissioner of labor, or his deputy, requires that all planers shall be properly guarded when deemed necessary by the factory inspector, requires deputies to make a report to the commissioner of labor of each factory inspected, such report to be kept on file, and a copy thereof to be left with the owner of the establishment inspected, provides that the commissioner of labor shall annually make to the governor a report of such inspection, and for the printing and distributing of such reports.

Upon the trial plaintiff called as his first witness Henry J. Eikhoff, who testified that in 1905 he was employed by the State as a factory inspector, and was so employed for several years, and that during the term of his employment he annually inspected defendant's factory. He was shown a book which he identified as the statistical field book kept by him in the year 1905, and he identified entries therein, made by himself, showing an inspection of the factory June 2, 1905. There was an entry under the head, "Orders Made by Inspector." He testified that the entry refreshed his recollection so that he was able to say that the jointer was not then guarded; but he would not state from recollection that he left orders to put a guard on the jointer. He would not say that he did not leave such an order. He said:

"This factory always had a guard and there was no necessity for ordering a guard, but because of the men for various reasons removing the guards temporarily, when I would go to a place and find a guard removed, I would ask the man in charge of the machines to replace the guard. That does not necessarily follow that an order must be left. But where there is no guard upon a machine, and the work is of such a character that a guard can be used, then we write out an order, giving the name of the company.

"*The Court:* The question is, What did you do in this case? Did you leave orders to put on a guard, or did you not?

"*A.* I don't remember."

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This question (whether the witness could state from recollection, refreshed by the record, that he made an order to guard the knives) was several times, and in various forms, repeated, and the witness answered that he did not remember. He was not permitted to read to the jury the notation to which his attention was directed.

"*The Court*: This witness has testified now twice after examining the memorandum that he doesn't remember whether or not he left an order. At least, I so understand your testimony, Mr. Eikhoff.

"*A.* That is right.

"*Mr. Milligan:* It seems to me that the circumstances are these: That, if we can show here this book is in his handwriting, these orders and these memoranda which he testifies are in his handwriting, kept by virtue of the laws of the State of Michigan, we have a right to have that book go in evidence on that proposition.

"*The Court:* I will give you an exception. I don't think so."

The witness was further interrogated:

"*Q.* Do you know whether that is printed?

"*A.* I don't know positively whether it is printed. There is a printed report gotten out by the State.

"*Q.* Are you familiar with that report of that description (showing book to witness)?

"*A.* Yes, sir.

"*Q.* Will you look on page 222 of that report, gotten out by the commissioner of labor, and see whether or not any orders appear there in the printed report? I want to get you upon record upon this proposition. Do I understand you to tell this jury, under oath, that from the memorandum that appears on this book which you have read, that you are willing to tell this court and jury that that does not refresh your recollection as to having left an order there to guard the jointer and shaper knives in that factory?

"*A.* Yes, sir.

"*Q.* You mean to say that, do you?

"*A.* Yes.

"*Q.* Do you know what are done under the law with orders that are left to guard machines of these factories that you visit? * * *

"*A.* Yes.

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"Q. What are done with them? (Objected to and excluded.)

"*Mr. Milligan:* Why, under the law, if your honor please, those are admissible in evidence.

"*The Court:* I would like to see your authority for it.

"Q. Does that refresh your recollection, witness?

"*Mr. Connor:* He has no recollection on that subject.

"*The Court:* If it is an additional memorandum, he may use it.

"A. That does not.

"Q. Look at it carefully especially down here (indicating).

"A. I see where it is marked.

"Q. Does that refresh your recollection?

"A. That does not refresh my memory with reference as to whether an order has been left or not.

"Q. If it says there that an order was left, would not that refresh your recollection about it? * * *

"A. I don't remember.

"Q. Does it in any way refresh your recollection?

"A. No, sir.

"*Mr. Milligan:* I will offer this book in evidence, if your honor please. It is a public record."

The witness testified that to his knowledge all reports of inspections which were in the office of the commissioner of labor were destroyed in 1906.

"*The Court:* It seems to me, gentlemen, that, under the circumstances now before the court, justice will better be served if the court simply directs a verdict at this time, stating in the direction the admission of counsel that their cause of action is predicated upon this situation; that is to say, that they claim notice was given reciting the facts as they thus far appear, and let the Supreme Court pass upon the question whether or not these books, under these circumstances, are receivable in evidence as substantive proof; that makes the record very short. Do you see any objection to that, Mr. Connor?

"*Mr. Connor:* Not if the plaintiff is willing to concede that his case must fall without such testimony.

"*The Court:* Plaintiff's counsel has very plainly told the court that. I understand there is no question about that, is there, Mr. Milligan?

"*Mr. Milligan:* No."

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The court thereupon directed a verdict for the defendant. Except as stated in the charge to the jury, it does not appear what the entries in the field book were. The court stated that upon the field book, under the head, "Orders Made by Inspectors," appeared the notation, "Guard all jointer and shaper knives," and that substantially the same words appeared in the annual report for 1906. Referring to the twenty-third annual report of the Michigan Bureau of Labor, a volume containing also the thirteenth annual report of State factory inspection, at page 180, it appears that under the general heading, "Synopsis of Orders Made by Inspectors," it is written:

"The following are the orders made by the several inspectors while prosecuting their work in the season of 1905. They are given by counties in alphabetical order."

On page 222 is to be found: "Detroit Wood Pulley Co.—Guard all jointer and shaper knives; also emery wheel." The rulings excluding the testimony of Eikhoff as to the contents of the books, excluding his statement of his routine duties, and excluding the field book and the annual report, are the grounds of the errors assigned.

OSTRANDER, C. J. (*after stating the facts*). The learned trial judge expressed his views in the following language:

"It does not seem to me, in view of the fact that the burden of proof in cases of this description is upon the plaintiff, and in view of the fact that the plaintiff must make out a *prima facie* case before there is anything to be submitted to the jury, that a jury can be permitted to guess from documentary evidence originating with a live witness whether or not his * * * recollection is a prompted recollection or not. And, when he is unable to say to you that he gave the notice contemplated by the statute, I don't think that these other documents under the circumstances of this case are receivable in evidence. It appears beyond controversy that at some time (the) commissioner of labor had cleaned house in and about his office, and the records of 25 years' standing and upwards were all destroyed. So there is no way of show-

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ing whether the duplicate notice, the notice contemplated by the statute, was ever made; whether there was ever any such notice or not."

The ultimate fact sought to be proved was that an order to guard the planer had been made. The witness testified, in substance, that, with or without the aid of the memorandum, he had no present recollection of the fact.

If he had testified that the writing refreshed his recollection, so that he had a present recollection of the fact sought to be established, the writing would not have been admissible as further substantive evidence of the fact. In such a case it is the testimony of the witness, the recollection, which is evidence, not the document or writing used to refresh recollection.

In testifying that the memorandum or notation made by him in his field book indicated that at the time when it was made the planer knives were not guarded, the witness testified to what is obvious. The memorandum indicates, not only that, but it indicates, also, that the inspector left an order to guard the planer knives. The book was kept for the purpose of recording just such facts as the memorandum imports. It is supplemented by the printed, authoritative report of the commissioner of labor, which indicates that the inspector, witness, pursuant to law, made to the commissioner a report in harmony with the memorandum of fact which was made in the field book.

In *Fisher* v. *Kyle*, 27 Mich. 454, it appeared that the trial court refused to permit an attorney to read to the jury the minutes taken by him of testimony given on a former trial. This court, speaking by COOLEY, J., said:

"Had Draper testified to any present recollection of what these witnesses swore to, he would have been allowed to state what it was. But clearly his minutes, taken at the time, and which he swore were correct, were much less liable to err than any recollection he might have could possibly be. His minutes embodied his understanding of the evidence at the time, and would remain the same, and not become varied in the lapse of time; but his recollection, which would start with the same understanding, was

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constantly liable to be more or less perverted and changed, or in material parts obliterated from the memory. It could not possibly, therefore, be more certain than the minutes, and, as every variation from the minutes must render it more uncertain and unreliable, any rule of evidence which would admit the recollection and exclude the minutes must obviously be illogical and unsound. We approve, in this regard, of the case of *State* v. *Rawls*, 2 N. & McC. [S. C.] 334, and *Halsey* v. *Sinsebaugh*, 15 N. Y. 486, which we think lay down the true rule, and explain the origin of some misapprehensions regarding it."

See, also, *Spalding* v. *Lowe*, 56 Mich. 366 (23 N. W. 46); *Lucker* v. *Liske*, 111 Mich. 683 (70 N. W. 421); *Draper* v. *Brown*, 153 Mich. 120, 132 (117 N. W. 213). In *Halsey* v. *Sinsebaugh*, 15 N. Y. 485, referred to by Mr. Justice COOLEY, the opinion was written by Judge Selden. He said, in part:

"The learned judge who presided at the trial seems to have followed the rule laid down by Mr. Phillips in his work upon Evidence, which is, in substance, that such memoranda may be used to refresh the recollection of the witness, but can have no force as evidence, unless the witness, after referring to the memorandum, has a present recollection of the facts to which the memorandum relates.

"This was, no doubt, at one time, supposed to be the true rule; and, as such, it was adopted and followed in several cases by the courts of this and other States. *Lawrence* v. *Barker*, 5 Wend. [N. Y.] 301; *Feeter* v. *Heath*, 11 Wend. [N. Y.] 485; *Calvert* v. *Fitzgerald*, Litt. Sel. Cas. [Ky.] 388; *Juniata Bank* v. *Brown*, 5 Serg. & R. [Pa.] 232. But in the case of *State* v. *Rawls*, 2 Nott & McC. [S. C.] 334, this rule was subjected to a critical examination by the Constitutional Court of South Carolina, and was, as I think, proved to have originated in a misapprehension of the cases of *Doe* v. *Perkins* [3 D. & E. 752], and *Tanner* v. *Taylor* [MSS.], cited by Mr. Phillips in its support. The commentary by Nott, J., upon those cases shows conclusively that the memoranda there produced were not the originals made by the witness at the time the events occurred, but mere copies or extracts from such originals taken long afterwards.

"This commentary, which is quoted *in extenso* and approved by Cowen, J., in the case of *Merrill* v. *Rail-*

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road Co., 16 Wend. [N. Y.] 586 [30 Am. Dec. 130], seems to me entirely just and sound; and I entertain no doubt that Mr. Phillips fell into an error from not discriminating with sufficient care between the original memorandum itself and a mere copy. This subject is treated with much learning and ability in the Notes to Phillips' Evidence, by Messrs. Cowen & Hill (note 528 to p. 290), where the authorities bearing upon it are elaborately reviewed; and I fully assent to the principle there stated, 'that an original memorandum, made by the witness presently after the facts noted in it transpired, and proved by the same witness at the trial, may be read by him, and is evidence to the jury of the facts contained in the memorandum, although the witness may have totally forgotten such facts at the time of the trial.'"

In *State* v. *Rawls*, 2 N. & McC. (S. C.) 331, the rule is stated in the headnote as follows:

"Where a person who is a witness to a particular transaction, has made a memorandum at the time of certain facts for the purpose of perpetuating the memory of them, and can, at any subsequent period, swear that he had made the entry at the time for that purpose, and that he knows from that memorandum that the facts did exist, it will be good evidence, although the witness does not retain a distinct recollection of the facts themselves."

In Jones on Evidence (2d Ed.), § 883, the effect of the testimony identifying the writing, plus the writing itself, is said to be "the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum." And in 1 Wigmore on Evidence, § 747, it is said in analyzing and illustrating the rule:

"The witness must be able now to guarantee that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he 'knew it to be true at the time.'"

Under this rule, the memorandum was competent evidence of the fact recorded therein if its verity as a record of fact was sufficiently established. Was the fact that it was true when made sufficiently guaranteed?

Upon this point the only doubt which can exist arises

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from the testimony of the witness tending to prove that, notwithstanding the record, and what it imports, he may have in fact left no order with the proprietor, but have merely given one to the men, or to one of them employed there, to replace a guard which had been removed. In short, he professed to have a present recollection, which discredits, if it does not deny, the truth of a memorandum which he admits having made in the performance of official duty. I am of opinion that the question whether the truth of the memorandum was sufficiently guaranteed was one for the court to determine, and that, as the record stood, it was not error to exclude the memorandum.

But I am impressed that, under the circumstances disclosed, it was error to exclude testimony of the routine duties of the inspector. The ground of the ruling was that the inspector could not have duties in the premises other than those prescribed by the statute. Now the statute does not say that the inspector shall carry a book, or shall make any memorandum of his acts other than to make a report thereof. But it appears that the witness carried a book in which he made memoranda. His testimony indicates that the book was furnished by his superior for the purpose of making memoranda therein. The heading referred to indicates that he was expected—required—to make a memorandum thereunder in accordance with the fact. Was he also expected to—required to —make a memorandum thereunder not in accordance with the fact which the heading indicates? For example, was it his duty to make such a memorandum as well when he told a workman who had removed a guard placed by the employer to replace it as when he ordered the employer to guard the machine? If it was not a duty, was it a habit of the witness to make such memoranda in either case? And, if it was not his habit, did he occasionally make false entries? It must be kept in mind that the discovery, and not the suppression, of material facts, is the purpose of the court, and that a party litigant has the right to prove material facts by competent evidence. Under the

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rule which has been stated, this book was competent evidence of the recorded fact, although the witness had forgotten the fact, if the accuracy of the record was established. It would have the same probative value as the testimony of the witness that upon the occasion in question he ordered defendant to guard the planer knives. *Spalding* v. *Lowe*, *supra*. The testimony of the witness tended somewhat to discredit the accuracy of his memorandum, to deny that it meant, when made, what it seems to mean when read in the light of the duty he was performing, and in the light of his statement that it was a memorandum made by him at the time, and that he cannot now tell whether he did or did not leave an order to guard the planer. Counsel should have been permitted considerable latitude in examination of the witness upon the subject of his routine duties to discover whether the witness can now sufficiently guarantee that the memorandum was true when made.

While it was persuasive evidence that the memorandum in the field book was not spurious, but was made at the time indicated in the discharge of the official duty of the witness, the annual report was not, in my opinion, evidence of the fact that an order to guard the planer had been made.

The judgment is reversed, and a new trial ordered.

STEERE, MOORE, MCALVAY, and STONE, JJ., concurred.

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EDWARDS STANWOOD SHOE CO. *v.* CURTIS.

SALES—RESCISSION—WARRANTY—RETURN OF GOODS.

Where defendant purchased a quantity of rubbers of plaintiff upon the understanding that if they were not satisfactory defendant could return them, but the purchaser, not effecting any sales for some time, wrote plaintiff asking for an extension of time, which plaintiff refused, and where defendant, having received back from her customers certain rubbers that proved defective, notified the plaintiff of the fact, and afterwards returned the shipment, stating that since plaintiff refused to grant the extension of time she returned the goods, defendant was not limited to the ground of objection stated in her first letters, and the verdict for defendant was supported by the testimony

Error to Arenac; Sharpe, J. Submitted November 14, 1911. (Docket No. 110.) Decided December 29, 1911.

Assumpsit by the Edwards Stanwood Shoe Company against Alice R. Curtis for goods sold and delivered. Judgment for defendant. Plaintiff brings error. Affirmed.

B. J. Henderson, for appellant.

W. C. Cook, for appellee

BLAIR, J. Plaintiff brings this suit to recover the price of certain rubbers, amounting to $191.16. On January 22, 1908, defendant gave an order to plaintiff's traveling salesman for the rubbers, to be shipped not before September 1, 1908; the bill to be dated November 1, 1908, 30 days net. Defendant testified:

"*Q.* State to the jury, if you please, what your contract was with reference to these rubbers.

"*A.* He told me when he sold me these rubbers, if they were not satisfactory in every respect, that I could return them at their expense. I received the rubbers some time during the month of September, 1908, and put them in the storehouse until I opened the winter sale.

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"*Q.* And at what time of the year does your rubber sale usually start in this country?

"*A.* It usually starts along about the 1st of November.

* * *

"*Q.* Up to the time that this bill became due, Mrs. Curtis, had you sold any rubbers?

"*A.* No, sir; I had not.

"*Q.* State to the jury the reason why you had not been able to sell.

"*A.* It was owing to the hot, dry fall; we had fires all over Arenac county, and people didn't have any reason to buy rubbers. They could wear anything most that would hold on their feet.

"*Q.* About what time was it that you first began to sell those rubbers?

"*A.* The first rubbers I sold was on the 28th of November.

* * *

"*Q.* And what happened after you sold those rubbers, Mrs. Curtis?

"*A.* Why, they brought them back, and I gave them another pair in the place of them.

"*Q.* Well, how long did they have those rubbers before they brought them back?

"*A.* The first pair was brought back on Saturday, December 12th, and I notified them on the 14th."

The salesman sent his memorandum of the order to plaintiff, and September 9, 1908, plaintiff shipped the rubbers, and an invoice was sent to defendant, which conformed to the order. No information was furnished plaintiff of the oral arrangement between the salesman and defendant. November 25, 1908, defendant wrote to plaintiff:

"If it is not asking too much, I wish you would please give me an extension of thirty days on the rubbers. Owing to the dry warm weather, we have not sold a pair of rubbers."

Plaintiff replied that on prompt payment of one-half of the bill it would extend the balance to December 20th. December 1st defendant wrote as follows:

"If you had rather that I would ship the goods back than to extend the time, please let me hear from you by return mail, and back comes the goods."

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December 3d plaintiff replied, declining to permit return of the goods.

Defendant testified that she wrote to plaintiff December 14th:

"I wrote them that there had been some rubbers returned, and if I didn't hear from them that week I should return the balance.

"*Q.* Is that all that the letter contained, Mrs. Curtis?

"*A.* As near as I can remember.

"*Q.* That was all that you can remember that this letter contained?

"*A.* Yes, sir.

"*Q.* Did you write to them on any other occasion, Mrs. Curtis, with reference to the condition of these rubbers, of what was the matter of the rubbers?

"*A.* That they being broke they were returned; that they were not satisfactory.

"*Q.* When did you write that?

"*A.* I wrote that in the letter of the 14th; that they had been returned not satisfactory.

"*Q.* Did you receive any reply to that letter of the 14th?

"*A.* Not until I received the telegram.

"*Q.* After the time you wrote that letter of December 14th, did you do anything with these goods?

"*A.* I kept them until the 21st, and shipped them back."

Plaintiff's manager testified that no such letter was ever received by plaintiff. December 23d defendant wrote to plaintiff, inclosing draft to amount of goods sold, $56.79, saying:

"Now as you could not wait the time asked I have sent you back the rubbers not sold. This will save you time and expense."

Defendant secured verdict and judgment in her favor, and plaintiff brings the record to this court for review.

The assignments of error are as follows:

First. The court erred in overruling the plaintiff's motion for a directed verdict in its behalf, for the reason that the defendant was limited to the cause of complaint stated in her letters, and that, such cause of complaint not being sufficient in law to warrant a refusal to accept the goods, plaintiff was entitled to recover the contract price.

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Second. Intemperate language of defendant's counsel in his argument to the jury.

Counsel for plaintiff rely upon *Providence Jewelry Co.* v. *Bailey*, 159 Mich. 285 (123 N. W. 1117), as decisive of this case in favor of plaintiff. The cases are not parallel. In the *Jewelry Case*, the plaintiff was entitled to recover by the very terms of the contract, unless the defendant could invalidate the contract upon the ground of fraud. In the present case, by the terms of the contract as testified to by defendant, she had a right to return the goods if unsatisfactory to her. According to her testimony and according to the letter itself, she had not sold any of the rubbers at the time she wrote her first letter, asking for an extension of time. None of the rubbers had been returned when she wrote the second letter, and she testifies that two days after the return of the rubbers she wrote to plaintiff that rubbers had been returned broken and unsatisfactory, and if she didn't hear from them that week she should return the balance; and she testifies that she did ship them back on December 21st, notifying them thereof by her letter of December 23d.

Plaintiff's manager testified that the sales agent had authority to make the agreement as testified to by defendant, and she had a right to assume that plaintiff knew what the terms of the contract were. Her letter of December 14th is susceptible of the interpretation, in connection with her prior letters, that, although the rubbers had proved to be unsatisfactory, she would retain them if the plaintiff, within the week, would extend the time of payment. We think the trial judge properly declined to hold, under such circumstances, that defendant could not insist upon the defense urged by her.

The second assignment is without foundation.

The judgment is affirmed.

OSTRANDER, C. J., and STEERE, MCALVAY, and STONE, JJ., concurred.

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STONE *v.* FROHLICH.

1. SALES—INSPECTION—REASONABLE TIME FOR REJECTION.
   The delay in inspecting and rejecting lumber bought on 60 days' credit, beyond a reasonable time for examining and refusing the merchandise, was not excused merely because of inconvenience to defendant.
2. SAME.
   A delay of 28 days before inspecting, and of more than 60 days before notifying the shipper that the lumber was deficient in quality, was unreasonable, as a matter of law.
3. SAME—RECOUPMENT.
   Where defendant's testimony showed that the lumber was short in measure, and the court, after asking defendant how much shortage he claimed, deducted the total amount thereof at its highest value from plaintiff's claim, and directed a verdict for the remainder, defendant was not prejudiced.

Error to Wayne; Rohnert, J. Submitted November 17, 1911. (Docket No. 100.) Decided December 29, 1911.

Assumpsit in justice's court by Fred J. Stone against Edward Frohlich for the purchase price of certain lumber. The cause was removed to the circuit court by appeal. Judgment for plaintiff on a verdict directed by the court. Defendant brings error. Affirmed.

Lucking, Emmons & Helfman, for appellant.

Fred H. Aldrich, for appellee.

OSTRANDER, C. J. Defendant orally gave plaintiff an order for a car load of lumber. The car was loaded and shipped from some point in Kentucky, January 17, 1908. The invoice went forward to defendant the same day. The terms were 2 per cent., 10 days, or 60 days acceptance. The invoice shows a total of 11,835 feet. There were two sizes of lumber, 5–4 and 4–4, and in the invoice the quantity of each size is divided and billed under different prices per thousand, as follows:

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2,293 ft., 5–4, price		$26 00
5,621 " " "		80 50
1,921 " 4–4, "		25 00
2,000 " " "		27 00

The car was placed on defendant's siding on the morning of February 11th, and was unloaded by defendant on the 17th. Defendant paid the freight. No settlement having been made for the car, plaintiff sued the defendant in justice's court. There was an appeal to the circuit court, where the cause came on to be tried June 7, 1910, resulting in a verdict for the plaintiff, directed by the court, for $294, which was exclusive of the freight paid, and which allowed the defendant for 20 feet of lumber at the highest price. Defendant moved for a new trial, which was refused.

The testimony of the defendant tended to prove that, because of certain extraordinary conditions attending the delivery of car loads of freight at his yard at about the time when the car in question was delivered, it was inconvenient and deemed to be inexpedient to inspect the lumber as it was taken from the car; that it was unloaded upon the yard, and was not inspected until March 7th, when it was found that only a small portion of the lumber was of the grade of lumber ordered. Being informed of this, the defendant endeavored, he says, to reach plaintiff by telephone at his apartments in Detroit, but was unable to do so, and finally sent him a postal card, and told him to call. He testified:

"I attempted to reach him a number of times, but he was out of town, and did not answer. Then I dropped him this postal card; he came in. I told him I would not accept the lumber. I told him it was not the quality I purchased."

This postal card was received by the plaintiff April 14th, on the same day that it was written, and he called upon the defendant on the 15th of April. April 24th defendant wrote plaintiff a letter, stating that he refused to accept the lumber, because it was not the kind of

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lumber that was sold, and directing him to remove it, pay freight and cost of unloading and storage. Over defendant's objection, the court ruled, as matter of law, that defendant had not inspected and rejected the lumber within a reasonable time. This is assigned as error.

It appeared that the plaintiff and his family resided in apartments in the city of Detroit, and he had his office in his apartment, and a telephone; that he himself was out of the city two-thirds of his time, but was in and out on short trips. It does not appear at what time, or times, defendant sought to reach plaintiff at his apartments by telephone, or how many times he made the attempt; that he left word, or attempted to, with any member of plaintiff's family; or that he used the mail for the purpose of sending notice, until a month and seven days after the lumber was inspected, and almost two months after it was received and unloaded. Counsel agree that defendant was bound to use reasonable diligence to inspect the lumber, and to notify plaintiff that he rejected the car. Defendant testified:

"Our custom usually is to inspect lumber as it was unloaded right from the car. If the car is not up to grade, we notify within a reasonable time, within a few days, within a day or two, if we are able to write them; but if in the city we use the telephone, and call them up. I knew where I could reach him by mail. We did eventually write a card to him when I could not get hold of him."

Usually, what is a reasonable time for inspecting and rejecting goods tendered in performance of a contract of sale is a question for the jury. But delay may be for so long a time that no two opinions upon the subject can be reasonably entertained. Defendant, appreciating, we assume, the necessity therefor, attempts to excuse his delay in making inspection of the lumber, and his further delay in notifying plaintiff that he refused to accept it. But it is clear that at the best his convenience, and not his necessity, occasioned the delay in inspection, and no reasonable effort to notify plaintiff was made until 37 or 38 days after

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the inspection, until, in short, the full term given for payment had expired, or was about to expire. We think the ruling made was a proper one.

It is contended that if defendant is held liable to pay for the lumber which was delivered it was for the jury to determine the quantity. Two of defendant's witnesses testified to a scale of the lumber, one making a total of 11,812 feet, and the other a scale of 11,602 feet, while the invoice calls for 11,835 feet. One of these witnesses tallied the lumber as 5–4 and 4–4, and made 4,695 feet of 5–4, while the invoice calls for 3,921 feet. The same witness made 7,117 feet of 5–4, while the invoice calls for 7,914 feet. Some of the 5–4 was billed at a higher price than some of the 4–4; some at a less price than some of the 4–4. Each of these witnesses also testified that he inspected—graded—the lumber, and the respective quantities thereof are stated with reference to the quality of the lumber. One witness found, he said, only 2,747 feet grading B and better out of a total of 11,602 feet, and that there was a difference in price between B and better and common of about $12 a thousand. It is clear that whether the judgment is too large depends on how the lumber shall be graded, because in no other way can it be determined in what grade of lumber, irrespective of its size, the alleged shortage occurred. Defendant did not inform plaintiff of any shortage. He had the invoice which informed him that the car was loaded with two grades of each size of lumber, and that a price had been charged for each grade of each size. Further than this, the defendant, in answer to questions asked by the court, claimed a shortage in the total quantity of only 20 feet, upon which statement the court acted and deducted the price of 20 feet at the highest price. We think no error is made to appear.

The judgment is affirmed.

STEERE, MCALVAY, BLAIR, and STONE, JJ., concurred.

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In re BALUSS' ESTATE.

APPEAL AND ERROR—RECORD—BRIEFS—ASSIGNMENTS.

Two cases, heard as one upon a single bill of exceptions that by stipulation counsel used in both cases, are ordered struck from the docket because the printed record contains no assignments of error, references to the record appear in blank, the index is omitted from the record in one case and the record and briefs are very uncertain and confusing.

Error to Lenawee; Golden, J. Submitted November 14, 1911. (Docket Nos. 114, 115.)

Webster C. Jipson presented two claims against the estate of Daniel D. Baluss, deceased. Both were disallowed by the commissioners on claims, and on appeal to the circuit court judgment was entered for defendant estate. Stricken from the docket December 29, 1911.

Smith, Baldwin & Alexander, for appellant.

Dayton B. Morgan and *J. N. Sampson*, for appellee.

PER CURIAM. These two causes were submitted upon briefs. Both causes were tried in the court below by the court without a jury. There appears to have been a single bill of exceptions settled, which counsel have intended to use, and by stipulation seem to have agreed to use, in both causes. The alleged bill of exceptions is printed in the record in the cause first above entitled. It contains no assignments of error. It contains many references to the record which are left blank, indicating that when the record went to the printer the paging was omitted, and it has never been supplied. In No. 115, second above entitled, the record contains no index. The bill of exceptions is not printed. The briefs contain numerous references, inserted in ink, to the record in the other case.

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In addition to this, we have found the records and briefs in both cases so uncertain and confusing that we feel warranted in declining to consider either of these causes upon the records as filed in this court.

An order will be entered striking both causes from the docket.

SCANLON *v.* CONNOR.

DEEDS—INTOXICATION AS AFFECTING CONVEYANCE—FRAUD—SETTING ASIDE INSTRUMENTS.

A conveyance of real property worth $1,200 and of personal property worth $1,000, procured by defendant while complainant, the grantor, was in an intoxicated condition brought about by defendant, who paid only $700 for the property, was fraudulent and properly set aside in equity.[1]

Appeal from Muskegon; Sessions, J. Submitted December 13, 1911. (Docket No. 129.) Decided December 29, 1911.

Bill by Mike Scanlon against Charles Connor to set aside a deed of realty and a bill of sale of personalty for fraud. From a decree for complainant, defendant appeals. Affirmed.

James E. Sullivan (*Turner & Turner*, of counsel), for appellant.

Cross, Vanderwerp, Foote & Ross, for appellee.

[1] Validity of contract made with intoxicated person, see notes in 54 L. R. A. 440; 2 L. R. A. (N. S.) 666; 25 L. R. A. (N. S.) 596.

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MOORE, J The bill of complaint was filled in this case October 22, 1910, to set aside a deed to real estate and a bill of sale of personal property made October 11th of the same year. From a decree in favor of the complainant, made after a hearing in open court, the defendant has brought the case here by appeal.

The complainant was the husband of Ella Scanlon, who lived at Muskegon, Mich., and died as the result of severe burns. Her husband, the complainant, was at that time working at Moline, Ill. Her heirs at law were her husband, two living brothers, one of whom is the defendant, one living sister and the children of two brothers, deceased. The defendant lives at Muskegon. The relatives did not notify the complainant of the death of his wife. He learned of that through a letter written him by a friend. It was not until he reached Muskegon that he learned the cause of her death.

It is the claim of complainant that soon after his arrival at Muskegon the defendant and himself began to drink intoxicating liquors, including whisky, furnished by defendant, the defendant drinking much less than complainant; that this continued for two days, when defendant induced complainant to sign the conveyances above referred to for $700. It is his further claim that the value of his interest in the real estate conveyed by him was in the neighborhood of $1,200, and of the personal property nearly, if not quite, a like amount, more than $1,000 of which was money in the bank. His further claim is that what was done by defendant was in law and in fact a fraud upon him. We have already stated that the trial judge who saw the witnesses found the contention of the complainant to be true.

It would profit no one to set out the testimony here. It establishes clearly that the condition of the complainant was brought about by the defendant; that defendant employed one of his neighbors to help him procure the conveyance of the property; that the neighbor visited a scrivener without the knowledge of the complainant, and pro-

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cured the papers to be drawn; that, after the transaction was completed, defendant paid the neighbor $70 for what he had done; that, when complainant was in the condition indicated above, defendant procured from him for $700 conveyances to property worth upwards of $2,000, more than $1,000 of which was money in the bank. In *Miller v. Sterringer*, 66 W. Va. 169 (66 S. E. 228, 25 L. R. A. [N. S.] 596), the court said:

"The decree is fully justified. In some particulars the evidence is conflicting, it is true, but material facts and circumstances glaringly appear and strongly support the decree. These facts and circumstances make the case distinctly one of fraud and imposition. It may not be a case of absolute want of mental capacity to make a deed. Though the intoxication may have been of less degree than total at the time the deed was executed, yet clearly the evidence establishes that it was the means by which the grantor was misled and deceived to his prejudice. Cases like this one do not so much involve questions of incapacity as they involve questions of fraud and undue influence. Where it is shown that only partial intoxication has been made the means of practicing a fraud in obtaining a deed, or securing a fraudulent advantage, wholly against conscience, equity will interpose. * * *

"The greatest of Virginia law commentators concisely states:

"'The plea of drunkenness was formerly regarded with as little favor in civil, as it still is in criminal, cases. For although Lord Coke classes a drunkard as *non compos mentis*, yet he allows him no indulgence on that account. "As for a drunkard," says he, "who is *voluntarius daemon*, he hath (as has been said) no privilege thereby, but what hurt or ill he doth, his drunkenness doth aggravate it." But for more than a century this rigorous doctrine has been much relaxed, and it is agreed that drunkenness invalidates or renders voidable all contracts and transactions where (1) the drunkenness was brought about by the opposite party; (2) a fraudulent advantage was taken of it; (3) it deprived the party of his reason, and of an agreeing mind. * * * The mere fact that one is drunk when he enters into a contract is no ground for setting it aside, at least in equity, unless under one or the other of the circumstances above stated; but when a person's habitual addiction to intoxication renders him extremely subject to imposition, such

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habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination whether any instrument executed by him does not in itself, or in the attendant circumstances, contain evidence that advantage was taken of those habits.' 2 Minor's Institutes (4th Ed.), 644.

"In the same connection this author further says that, when the drunkenness is brought about by the party obtaining the contract, the act is so flagrant a badge of fraud that it always renders the contract voidable, both at law and in equity; and that, where a fraudulent advantage is taken of the drunkenness, this, too, is so direct a fraud as always to render the transaction voidable in all courts.

"The principle that is particularly applicable to the case under consideration is that equity will relieve one from a contract made by him in drunkenness, though his reason may not have been wholly overthrown, where fraudulent advantage has been taken, or where the drunkenness has been brought about by the other party. It is recognized clearly in 17 Am. & Eng. Enc. Law, p. 402; 14 Cyc. p. 1105; 1 Story, Eq. Jur. 231; 2 Pom. Eq. Jur. 949; 2 Page on Contracts, § 905. Some of the many cases in point are: *Cooke* v. *Clayworth*, 18 Ves. Jr. 12; *Reynolds* v. *Waller*, 1 Wash. (Va.) 164; *Wigglesworth* v. *Steers*, 1 Hen. & M. [Va.] 70, 3 Am. Dec. 602; *Samuel* v. *Marshal*, 3 Leigh [Va.], 567; *White* v. *Cox*, 3 Hayw. (Tenn.) 79; *Hotchkiss* v. *Fortson*, 7 Yerg. [Tenn.] 67; *Crane* v. *Conklin*, 1 N. J. Eq. 346 (22 Am. Dec. 519); *Thackrah* v. *Haas*, 119 U. S. 499 (7 Sup. Ct. 311); *Jones* v. *McGruder*, 87 Va. 360 (12 S. E. 792); *Weldon* v. *Colquitt*, 62 Ga. 449 (35 Am. Rep. 128).

"In applying this principle, the following expressions have been used:

"'If a party has been led into a hard and disadvantageous bargain, while excited by liquor, equity avoids it. And the same rule applies to persons whose minds are enfeebled by habitual intoxication, although not actually intoxicated.' *Birdsong* v. *Birdsong*, 2 Head. [Tenn.] 289.

"'If, when a man is so drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud.' *Calloway* v. *Witherspoon*, 40 N. C. 128.

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"A Canadian chancellor, in the consideration of a case very similar to the one before us, has said:

"'It is manifest that a man of intemperate habits, a slave to strong drink, when dealing with the tavern keeper at whose house he lives, and from whom he obtains the liquor which he craves, and with which he daily stupefies or maddens himself, is as liable to be overreached, and needs for himself and family or heirs the protection of this court at least as much as a client who deals with his solicitor, or as a patient who has transactions with his medical attendant. No man is more helpless than a drunkard is in the hands of those who obtain his confidence, and to whom he looks day by day for the gratification of the morbid craving which has possessed him; and the modern doctrine of both law and equity is against giving up even a poor drunkard, or a drunkard's property, to be the prey of the rapacious and unprincipled.' *McGregor* v. *Boulton*, 12 Grant, Ch. (U. C.) 288."

To permit such a transaction as is disclosed by this record to stand would be a travesty upon justice.

The decree is affirmed, with costs.

OSTRANDER, C. J., and STEERE, BROOKE, and STONE, JJ., concurred.

BOARD OF WATER COMMISSIONERS OF THE CITY OF DETROIT v. BUTLER BROS. CONSTRUCTION CO.

1. MUNICIPAL CORPORATIONS—WATER SUPPLY—PUBLIC WORKS—ACTIONS—ASSUMPSIT.

   Upon the failure or neglect of a contractor engaged in constructing a tunnel for a private corporation, to take sufficient precautions for the protection of municipal water mains, the board of water commissioners were justified in taking reasonable precautionary measures, and could recover the expense thereof in an action against the contractor.

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2. SAME—EVIDENCE—MATERIALITY.
While it was immaterial to offer evidence of the breaking of a pipe which the contractor had paid for and was not involved in the action, the error was not prejudicial.

3. SAME—EVIDENCE—OPINION—INTENT.
Testimony of a member of the water board that the expense was incurred to guard against loss of life and the danger of a conflagration was proper evidence tending to show good faith, and was not an opinion.

Error to Wayne; Donovan, J. Submitted December 11, 1911. (Docket No. 41.) Decided December 29, 1911.

Assumpsit by the board of water commissioners of the city of Detroit against the Butler Brothers Construction Company and another for expense incurred in protecting the water pipes of said city. Judgment for plaintiff. Defendants bring error. Affirmed.

Russel, Campbell, Bulkley & Ledyard (*Henry M. Campbell*, of counsel), for appellants.

Richard I. Lawson and *Walter Barlow* (*P. J. M. Hally*, of counsel), for appellee.

The board of water commissioners of the city of Detroit is a body created by the legislature with power to lay, construct, secure, and maintain such pipes and and aqueducts as shall be required to furnish a full supply of water for public and private use in said city. In the year 1906 and thereafter, the Detroit River Tunnel Company, through Butler Bros. Construction Company, the contractors in that behalf, was engaged in constructing a railroad tunnel under the Detroit river and under the shores and lands bordering the river. As projected and constructed, the tunnel crosses Jefferson avenue in the city of Detroit about midway between Tenth and Twelfth streets at the intersection of Eleventh street and Jefferson; the top of the tunnel being some 37 feet below the surface of the earth. At this point it passes under a 42-inch water main; the top of the main being 5½ feet below the

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surface of the street. Over the water main is a sewer. In the water main are gates, or valves, which can be operated so as to stop the flow of water, if the necessity for doing so arises, one at Tenth street and one at Twelfth street. The operation of these valves is controlled by a key, and three men are required at each key to properly perform the service of closing the gates. The water main is cast-iron pipe, laid in sections, each 12 feet long; one end of each section being inserted into a collar upon the end of the adjoining section, and the joints being closed with hemp and melted lead.

In 1906, before construction of the tunnel had approached Jefferson avenue, defendant applied to the plaintiff board to furnish two men with keys, one for each valve, under whose supervision the gates could be closed. The men were furnished and were paid by the defendant contractor until September 21, 1908. A plan was prepared for supporting the main and was submitted to and approved by the engineer of the plaintiff board. Before the tunnel reached Jefferson avenue, it was deemed advisable to change the plan, and the new plan was formally submitted to the engineer of the plaintiff, and, while not expressly approved, was not objected to. Without going into details, it is sufficient to say that the pipe was exposed and was suspended clear of the surrounding soil; the weight resting ultimately upon concrete piers which extended below the bottom of the projected tunnel and were outside of its course. After the pipe was exposed, levels were frequently taken with instruments, and men were especially designated by defendant to observe the pipe. While the tunnel was being constructed under the street, observations were made hourly with instruments and a record thereof made and preserved. The tunnel was constructed under the pipe in May, 1909. The level of the pipe was not substantially changed; the maximum change being one-half inch on June 6, 1909, after the tunnel had been opened under the street. There was some, but an inconsiderable, escape of water, easily controlled by tamp-

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ing the joints. In short, the precautions taken by the contractor, at a cost of more than $9,000, were, in fact, sufficient to insure the integrity of the water main.

On September 21, 1908, the plaintiff board, acting by resolution, without consulting the contractor, put 18 of its own men to watch the pipe under the direction of the plaintiff. That is to say, three men were kept at each gate all of the time; each being on duty eight hours. The resolution of the board also directed that the cost be charged to the contractor. This force of men was continued until June, 1909, when some of the men were withdrawn, and until August 1, 1909, when they were all withdrawn. The aggregate of the charge for these men and supplies was $8,470.78. The appellants declined to pay the charge, and this suit was brought. At the trial, the jury returned a verdict for the plaintiff for the sum stated, against the defendant contractor.

Plaintiff's declaration contained two counts; one alleging an express agreement of defendant to pay the men employed by plaintiff, and the other containing the common counts in assumpsit. The trial court charged the jury that there was no evidence of an express agreement. The questions presented by the assignments of error, and discussed by counsel, are: (1) Whether a recovery as upon a quasi contract should have been permitted; (2) whether certain testimony concerning an eight-inch pipe which broke was admissible; (3) whether certain opinion evidence ought to have been received; (4) whether the charge was prejudicial to defendant.

OSTRANDER, C. J. (*after stating the facts*). 1. It is conceded that the duty rested on defendant to construct its tunnel without disturbing the water main. It is said that it fully performed this duty. It is argued that inasmuch as the theory of quasi contract relations of the parties rests upon the idea of such a duty, and as elaborate and successful means were taken to perform it, defendant is not liable. It may be doubted whether this statement

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of the duty resting upon the defendant is complete. The extent of the duty, the enforcement of which by an action of contract is permitted by a fiction of the law, must be determined by common sense and common justice. The duty of the public authorities in the premises should not be overlooked, nor the consequences of a break in the pipe, if the precautions taken had proved insufficient. Indeed, for the purposes of argument only, the appellant assumes that precautions other than the mechanical contrivances for supporting the pipe and for restoring its disturbed level were suggested by the circumstances. The appellant recognized the propriety, if not the duty, of being prepared to close the valves in the pipe. It did this by applying to the plaintiff to place men at the valves, equipped with apparatus for closing the valves. And in the written protest made in September, 1908, to the plaintiff, the appellant was complaining, not about the propriety of being able to control the valves whenever the soil in the street should be disturbed, but that until the tunnel approached the pipe the additional precautions taken by plaintiff were unnecessary. In part the communication read:

"In our judgment these men are wholly unnecessary at present. We would, in this connection, call your attention to the fact that for the past year and a half or more you have had a watchman there at our expense and this should be a sufficient safeguard until such time as we get near to the water main with our tunnel, when we again resume the work of excavating. We shall then be glad to have you put on the men that you consider necessary, and shall be willing to assume the expense in connection therewith. We would also point out to you that there should be no necessity for having as many as eighteen men. A force of six men should be sufficient, because we will at all times have our men in the immediate vicinity who could be called upon by any of your watchmen for assistance in closing the gates, whenever required. We would, therefore, respectfully request, when the watchmen are again put on, that only two men be employed in three shifts of eight hours each, making six men for every twenty-four hours. We fully realize the risk involved if

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a break should occur in this main and we are perfectly willing to stand any reasonable expense in connection therewith for the purpose of safeguarding the city's interests. We trust your honorable board will take action as herein requested."

The difference between the plaintiff and the appellant was not so much one concerning the duty owed by appellant, as it was one concerning the measures to be employed in its performance. They agreed that during a certain period, not arrived, but which did arrive, it would be proper to have more men at the valves, and that appellant ought to pay these men. They disagreed about the number of men necessary to perform the duty and whether the period had arrived when they should be put to work. We do not mean by this to say that the mere offer of appellant to employ additional men was, in the absence of its acceptance, conclusive evidence of the measure of its duty in the premises. But the offer is itself persuasive evidence of the fact that for some period of time, not arrived, greater precautions than had theretofore been taken would be required in the exercise of ordinary care. It is the theory of plaintiff and a proper legal theory, that, if appellant refused to take the ordinary care demanded by the circumstances, plaintiff had the right to do so at its expense. Whether defendant took such care, and whether plaintiff did more than the defendant should have been required to do, were not questions for the court.

2. It is alleged in the declaration, in the first count, that the defendant threatened to disturb, and did disturb, the water pipes owned by the plaintiff, which water pipes crossed and cross the course of the tunnel, and that plaintiff employed men to watch said water pipes. A witness was asked, "Do you remember when the eight-inch pipe broke?" and, over objection, answered, "It was on the morning of March 8, 1909." An officer of appellant, on cross-examination, over objection, testified that he did not protect the eight-inch pipe, that it was cheaper to let it break, and that appellant paid for it. This testimony

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was commented on by plaintiff's attorney in his argument to the jury. No recovery was sought because of the breaking of the pipe, and the testimony seems to have been wholly immaterial to the issue.

3. A member of the plaintiff board testified that what induced the board to refuse to recall the men and to continue them over appellant's protest was "to guard against an appalling loss of life, and the dangers of a conflagration that were very imminent in case there was a break in the pipe." The objection was that the testimony called for by the question was immaterial and incompetent. The testimony called for was not immaterial nor incompetent. It was not opinion evidence. Appellant has given reasons for its refusal to employ more men at the valves. The good faith of plaintiff was material, and the probable results if the pipe should be broken were loss of life and loss of fire protection to a portion of the city. The witness might have answered the question more simply; but no motion was made to strike out the answer, and we think no reversible error was committed in receiving the answer which the question called for.

4. The criticisms of the charge of the court are not very specific. It is said that on the whole it was prejudicial to appellant. The eighth and ninth requests to charge might well have been given as they were prepared by counsel. The substance of them was given and correctly stated the law. The reference in the charge to the seven modern wonders of the world, and the general want of clearness and of certainty of expression, do not call for a reversal of the judgment.

Upon a careful review of the record and briefs, we are satisfied that no error of law prejudicial to defendant was committed, and, no motion for a new trial having been made, we affirm the judgment.

STEERE, MOORE, BROOKE, and STONE, JJ., concurred.

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BAXTER *v.* COWHEY.

APPEAL AND ERROR—INSTRUCTIONS TO JURY—REQUESTS.

Though the court's charge, in an action by architects for compensation, was not clear or comprehensive, the verdict, which was not against the weight of the evidence, is affirmed, the issue being simple and no requests having been presented by appellant.

Error to Wayne; Donovan, J. Submitted December 11, 1911. (Docket No. 184.) Decided December 29, 1911.

Assumpsit by Frank G. Baxter and another against Thomas F. Cowhey for services rendered. Judgment for plaintiffs. Defendant brings error. Affirmed.

Henderson, Martindale & Grose, for appellant.

William G. Fitzpatrick (*C. E. Duffy*, of counsel), for appellees.

OSTRANDER, C. J. Plaintiffs, who are architects, wrote to defendant, for whom they were preparing the plans and specifications for a building, a letter which they claim embodied the result of former conversations and agreements. It is here set out:

"February 28, 1908.

"Mr. THOMAS F. COWHEY,
"Detroit, Michigan.

"*Dear Sir:*

"Verifying our recent conversation with you we are now at work on drawings for your three-story brick veneered apartment building to be built on Bowen avenue, north of Jefferson. We have agreed to make all drawings, details, blue prints, and specifications necessary for this work for $150.00. If contracts are let and we super-

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intend same we are to receive $175.00 for complete superintendence.

"Yours truly,
"BAXTER & O'DELL.

"$50.00 when drawings are completed, $75.00 on 10th March, '08, $25.00 when building is plastered.

"B. & O."

The postscript, as explained by plaintiffs, refers to the payment for the plans, which have been paid for. The building was erected. Plaintiffs claim that they superintended the construction of the building, and are therefore entitled to the contract price of $175, and for this sum they brought their suit. Defendant claims that the letter did not come to him until some time after the erection of the building had begun, that plaintiffs were not employed to superintend, and did not superintend, the construction, and that for such services as they performed, besides drawing the plans (which were to be in explanation, etc., of them), it was agreed they should be paid the sum of $25. It is agreed that some services were rendered by plaintiffs, or by one of them, after construction of the building was begun. The nature and extent of such services and the number of times the building was visited by the architect were testified to by the parties and by various contractors. It does not appear that either party presented any requests to charge. There was a verdict and judgment for plaintiffs for the amount claimed by them. A motion for a new trial was overruled.

Errors assigned are based upon the charge of the court, which, it is claimed, did not define, but, on the contrary, obscured, the issue, among other things presenting to the jury a theory of recovery based upon an implied contract to pay plaintiffs for services rendered. In a way, the court did advise the jury of the duty to be performed by them. He said:

"If you are convinced that the plaintiff here is entitled to recover, say so by your verdict, and, if not, say by your verdict. It would be a very simple thing then in

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balloting, plaintiff or defendant. If defendant, come in and tell us, and, if plaintiff, fix the amount. I will not name any arbitrary amount, but the amount named here claimed by the plaintiff is $175. That is the gross amount, and the amount claimed by the defendant is $25."

Later on in the charge appears the following:

"They had a jangle once, and they sent for the architect, and then he is there over 20 times, according to his testimony. He is there from the beginning taking what he claims to be the main part, what the defendants claim only a part. Now, whether their minds ever met upon the contract anywhere would depend upon the reading of the letter. It is not exactly clear, and, even if you read it, it does not give the whole transaction, because it is made, according to its date, back in February—that is, before it had been done—and it uses the language of the last clause like this. 'We have agreed to make all drawings, details, blue prints, and specifications necessary for this work for $150.00.' Up to there, there is not a word against it, there is not a word of dispute. We have agreed upon that amount, if you believe it up to that date. Now, he goes on, 'If contracts are let, and we superintend (all contracts, within the meaning of that paper), then we are to receive $175.00, and we do not hear anything more about that.'"

The language just quoted immediately precedes that which is especially complained about, which is:

"Now in law, if one stands by and sees another build a house for him to his advantage, and for his benefit, and he takes the benefit, why the laws will make the contract that a reasonable sum be paid. Even if they never have any contract at all. That is one way of measuring a contract. The law itself implies a contract. A man need not always make a hard and fast contract. And if you remember the Scotch adage, that the house never costs any less than the builder estimated, you will remember that nearly every house and every building put up has something changed, or altered, or amended, in some form in connection with it. So that it is a usual thing that midway in the building of a house a partition is taken down, and another put in, a dormer window or something. They very rarely continue from the beginning of a job to

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the very end of a job without some alterations, and in this case it is for the 12 men to find out if they made a further arrangement. If they did or did not make further arrangement, whereby they could use more of the architect's work than they originally intended, if there was one time that they met, or they said, 'No; I do not want to make any extra bill, I must keep down the bill,' or words to that effect, or that meaning."

Excepting the portion in which the jury was told that plaintiffs had the burden of proof, we have set out all of the charge which has any particular reference to the case which was being tried. It is said by counsel for appellees that what was said does not lack all of the requirements of a charge, which may be true, although it is difficult to understand how it could have in any manner aided the jury. We assume that counsel argued this case, and, in view of the simplicity of the issue, are disposed to affirm the judgment, somewhat influenced in this behalf by the fact that counsel for both parties refrained from suggesting amendments to the charge. We are impressed that the jury understood the point to be determined, and the verdict indicates that they believed the plaintiffs and their witnesses. We think the verdict is not so clearly against the weight of the evidence that we should set it aside.

The judgment is affirmed.

STEERE, MOORE, BROOKE, and STONE, JJ., concurred.

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PEOPLE *v.* KOHLER.

CRIMINAL LAW—APPEAL AND ERROR—MUNICIPAL CORPORATIONS—VIOLATION OF ORDINANCES.

A conviction upon a charge of violating a village ordinance is not reviewable on exceptions before sentence.

Exceptions before sentence from Monroe; McKay, J. Submitted December 14, 1911. (Docket No. 195.) Decided December 29, 1911.

Fred Kohler was convicted of violating a village ordinance. Exceptions dismissed.

John O. Zabel and *Willis Baldwin*, for the people.

Smith, Baldwin & Alexander, for defendant.

OSTRANDER, C. J. Respondent was convicted of violating a village ordinance. He seeks to review the record of his conviction upon exceptions before sentence, brought to this court by writ of error.

The cause must be dismissed, upon the authority of *People* v. *Smith*, 146 Mich. 193 (109 N. W. 411), and cases cited in opinion, *City of Muskegon* v. *Hanes*, 146 Mich. 385 (109 N. W. 674), and *Village of Lake Odessa* v. *Randall*, 158 Mich. 205 (122 N. W. 517). The court below is advised to proceed to judgment.

STEERE, BROOKE, BLAIR, and STONE, JJ., concurred.

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JOHNSON v. JACKSON.

MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

Where a safety device, used to hold the lever which operated a saw carriage, had been employed for six years without accident, and plaintiff's decedent was injured because the clamp in some conjectural manner became detached and permitted the carriage to start, fatally injuring decedent, there was not sufficient evidence of negligence to submit the case to the jury.

Error to Emmet; Shepherd, J. Submitted December 15, 1911. (Docket No. 141.) Decided December 29, 1911.

Case by Andrew Johnson, administrator of the estate of August Johnson, deceased, against Willis K. Jackson, surviving partner of the firm of Tindle and Jackson, for the unlawful killing of plaintiff's decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Keena, Lightner & Oxtoby (*Charles E. Ward*, of counsel), for appellant.

C. S. Reilley (*Frost & Sprague*, of counsel), for appellee.

OSTRANDER, C. J. Plaintiff's decedent, 53 years of age, was employed in a sawmill. He was injured January 13, 1910, while engaged in removing a swinging door or casing which covered the band saw on the side next to the carriage track; that being a part of the operation of changing saws. For this purpose the mill was stopped. When he was injured, deceased was standing on the track of the log carriage, his back to the carriage, holding the door he was taking down with one hand, and reaching up for a strap used to fasten it in the desired position. The log carriage was discovered in motion. An employé, who

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was near the lever used to operate the log carriage, found it out of place, and endeavored by its use to stop the carriage. He was too late, even if he properly used the lever (which he himself doubts), and deceased was pushed against the idle saw, and fatally injured. How the carriage was set in motion is, according to plaintiff, a question of probabilities, and, according to defendant, matter of conjecture only.

It is the theory of the plaintiff that plaintiff's decedent himself unconsciously set the carriage in motion. It is contended that an arrangement and maintenance of appliances which permitted this rendered the place in which plaintiff was called upon to work an unsafe place, for the condition of which, and of the consequences resulting to plaintiff's decedent, the employer is liable. The testimony for the plaintiff tended to prove that when the mill was in motion the head sawyer stood in a gangway near the car track and near the enclosed band saw; on one side of him, and operated with one hand, was the lever controlling to some extent the positions of the log on the carriage, and on the other side, operated with the other (the right) hand, was the lever controlling the movements of the log carriage. When the last mentioned lever was in a vertical position, the carriage could not be moved. As the lever was moved one way or the other from the vertical, the carriage moved to and away from the saw. It was 11½ inches from the stationary saw frame, and from 16 to 24 inches from the carriage track—nearer 24 inches, the head sawyer testified. To hold the lever vertically, a clip or clamp of iron or steel, open on one side, was provided, which fitted upon the lever and upon a stationary vertical standard, running up some 18 inches above the floor, thus holding the lever to the standard. Both the lever and the standard were iron or steel. A string or strip of leather was fastened to the clip and also to the saw frame at a point somewhat higher than where the clip, when in use, engaged the lever and the standard. When not in use, the clip hung conveniently from the

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string. It is the theory of the plaintiff that deceased, while holding and lifting the movable door or casing, stood upon one foot, and that his other foot, raised from the floor by his exertions, hit the string and removed the clip from the lever, the lever was tipped out of position, and the carriage set in motion.

The court having refused to instruct the jury that no negligence of the defendant had been proven, having refused, also, to instruct them that there was no proof that the injury was caused because of the string being attached to the clip, and having further refused to instruct that it was no more probable that the injury occurred because the deceased kicked the string or the clip than that it happened in some other way, we have been obliged to give, and have given, very careful consideration to the record, which contains the substance of all the testimony given at the trial.

So far as the clip itself is concerned, and the manner in which it engaged the lever and the standard, making the lever rigid, there is no competent testimony tending to prove that it was an unsafe device. Some testimony was introduced tending to prove that it would have been safer, so far as the danger of its being kicked off is concerned, if a pin or other device had been placed above it after it was in position; and there was testimony to the effect that if both the standard and the lever had been bored with holes, so that the lever could be held in position by a pin passing through the standard and the lever, there would have been less danger of its accidental removal. One can conceive of many ways of securing the lever, most of them inconvenient and unnecessarily wasteful of time. But the device which was in use did not consist of the clip only, but of the clip and the leather string, and when the clip was in position, holding the lever, the string passed across the 11-inch space between the standard and the saw frame to which the string was fastened. This space was not a passageway in any proper sense of the term, and there is no testimony tending to prove that it was used as a pass-

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ageway, although counsel for the plaintiff used the word in framing certain questions put to witnesses. The employé whose duties placed him near the clip and the string was the head sawyer, who operated the levers. It was his duty to use and remove the clip. The only other persons whose duties called them to the immediate vicinity of this string were the men who helped in the changing of the saws and in removing the door or casing about the band saw. One of them, by the use of a lever, released the tension upon the band saw. The other did what plaintiff's decedent was doing upon the occasion in question. The door or casing, the position of which he altered, was the one next the carriage track, which had to be swung down and outward across the track, and then lifted up and in, and fastened in position—a series of movements which were reversed, after the saws had been changed, to put the door or casing back into its original position.

The head sawyer, a man somewhat taller than plaintiff's decedent, testified that in doing this it was customary to put one foot on the right-hand or east rail of the carriage track, while facing to the north and east. The head sawyer testified that he placed the clip in position when he stopped the carriage. Another witness testified that after the injury occurred the clip was found disengaged, hanging from its string. In connection with this testimony, we have read those portions of the record which explain how plaintiff's decedent, or any one engaged in the same work, would stand in doing the work, and his proximity to the lever and the string, as well as the nature of the injury which he received. His right leg was torn or cut off at the hip.

It seems to be just as probable that the head sawyer was mistaken, honestly, of course, in supposing that he had securely locked the lever with the clip before he left it, or that the other employé, who was assisting at the work in hand with a lever, in some way disengaged the clip, or that in some manner steam had entered the cylinder controlled by the lever, as that plaintiff's decedent, stand-

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ing two feet or more away from the string and lever, exerting himself in supporting and handling the casing or door on the west side of the band saw, lifted his foot or leg against the string, and forced the clip from its position. One may speculate about the matter, but the record affords no basis for doing anything more. The same clip and string appear to have been in use in this mill for six years, which is the length of time that the mill has been running. It was the only device ever provided for holding the lever in a stationary position. The band saws were changed usually four times daily, sometimes oftener. Upon each of these occasions, at least three men, and, as we understand the record, four men, employed themselves in some way with the labor connected with changing the saws. Substantially the same thing was required to be done over and over upon each of these occasions, and the man who did what plaintiff's decedent did upon the occasion in question, did the same thing each time, and, as is made evident by the record, occupied substantially the same position each time.

It appears that on one previous occasion, some four years earlier, the carriage, supposed to be stationary, was found to be in motion, and was stopped by the use of the lever. We are satisfied that the record will not bear the construction that it was ever started but once, except upon the occasion in question. While several witnesses testified to an occasion when they say the carriage moved without the voluntary action of some one at the lever, they evidently refer to the same occasion. Upon that occasion, according to the testimony of the head sawyer, the clip was knocked off the lever in the operation of taking the saw down from the wheel. Another witness, describing the same occurrence, thinks that the clip was placed upon the lever wrong side up, which was the occasion for the starting of the carriage, and a third witness, who describes an occasion when the carriage started, and who agrees with the head sawyer with respect to the time of the occurrence, says that the clip was off the standard,

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and he could not tell whether it had been put on before the carriage started or not. One of these witnesses testified that upon one occasion he knocked the clip off himself, and put it back, and in explanation he says that a lever, used to let the strain off the saw, was laid on the floor directly under this string, and had become covered up with sawdust, so that when the witness reached down to get it and lift it from the floor the end of it caught the string and knocked the clip off.

Assuming that we are right about this, it appears that in the course of six years no one doing the work that plaintiff's decedent was doing upon the occasion in question had ever reached or touched the string or dislodged the clip, and that no one employed about the mill had ever unconsciously removed it. In this connection, there are other undisputed facts to be considered. Plaintiff's decedent was not a stranger in the mill. He had been employed there for a number of years, and had frequently performed the work he was doing when he was injured. The natural, if not the necessary, inference to be drawn from the testimony is that he and the other men employed about the saw and log carriage knew about the appliance used to keep the lever in a vertical position. This knowledge, possessed by a man who was ordinarily prudent, would tend to prevent movements, especially unnecessary movements, likely to disturb the lever. Assuming it to have been possible for plaintiff's decedent, while in the performance of his duty, to unconsciously lift the string sufficiently to release the clip and the lever, it does not necessarily follow that defendant was negligent in supplying and in using the appliance. Defendant's duty in the premises is to be measured by probabilities, not by the possibility that the lever could be released in the manner suggested by counsel, but by the probabilities that any employé in the performance of duty in the place in question would ever in such a way release the clip and the lever.

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"The fact of injury and the possibility of guarding against it do not necessarily make out a case of culpable negligence: very few acts in life are done with such care to prevent accidents as would have been possible; and the law only requires of any one that degree of care and prudence which persons who are reasonably careful ordinarily observe." *Schroeder* v. *Car Co.*, 56 Mich. 132, 134 (22 N. W. 220, 221).

See, also, *Richards* v. *Rough*, 53 Mich. 212 (18 N. W. 785); *Sjogren* v. *Hall*, 53 Mich. 274, 277 (18 N. W. 812); *Hewitt* v. *Railroad Co.*, 67 Mich. 61, 72 (34 N. W. 659).

We reach the conclusion that the testimony wholly fails to prove the negligence of defendant alleged in the declaration, and that the judgment must therefore be reversed. Being of this opinion, we find it unnecessary to consider other questions presented in the briefs.

Judgment reversed, saving to plaintiff the right, if he shall be so advised, to a new trial.

STEERE, BROOKE, BLAIR, and STONE, JJ., concurred.

MANOS v. DETROIT UNITED RAILWAY.

STREET RAILWAYS—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK BEFORE CROSSING TRACKS.

It was contributory negligence for a person, carrying an open umbrella on a rainy day, after looking for a car at the curb of a street, and seeing one approach half a block distant, to cross the track 11½ feet distant from the curb, without again looking.[1]

[1] For the similar question of duty of person at railroad crossing to stop, look, and listen after entering on first track, see note in 17 L. R. A. [N. S.] 505.

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Error to Wayne; Hosmer, J. Submitted February 15, 1911. (Docket No. 191.) Decided March 31, 1911. Rehearing denied December 29, 1911.

Case by Julia Manos against the Detroit United Railway for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Patrick J. Kelaher (*McHugh & Gallagher*, of counsel), for appellant.

Corliss, Leete & Joslyn (*A. B. Hall*, of counsel), for appellee.

HOOKER, J. The facts in this case are practically undisputed. The plaintiff herself testified that, on a rainy afternoon in June, she came from a store to a street corner, carrying an umbrella. Before attempting to cross the street, she looked and saw a car approaching about half a block away. It was 11½ feet from the curb where she stood to the nearest rail. She proceeded, and did not look again; was struck by the car which she had seen, and was injured. The learned circuit judge directed a verdict for the defendant, holding that the plaintiff was guilty of contributory negligence in not looking immediately before going upon the track, while in a place of safety, under the rule followed in a number of cases which we cite herein. We cannot doubt that she believed when she left the curb that she could cross in front of the car without being struck by it.

We have held many times that when one steps upon a track without looking and is struck, when, had he taken the trouble to look, he would have seen the danger, it is contributory negligence. That is not questioned, but counsel seem to contend that this rule has been modified by cases in which we have held that where he *did* look, and had reasonable ground for believing that he could safely cross, the case was one for the jury, whether

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common prudence justified his course or not. We will refer to both classes of cases.

In *Matta* v. *Railway Co.*, 69 Mich. 112 (37 N. W. 54), Mr. Justice MORSE held that one driving owed the duty of looking before venturing upon the track of a steam railroad. He cited the following Michigan cases: *Mynning* v. *Railroad Co.*, 59 Mich. 257 (26 N. W. 514); *Id.*, 64 Mich. 93 (31 N. W. 147, 8 Am. St. Rep. 804); *Haas* v. *Railroad Co.*, 47 Mich. 407 (11 N. W. 216); *Pzolla* v. *Railroad Co.*, 54 Mich. 273 (20 N. W. 71); *Potter* v. *Railroad Co.*, 62 Mich. 22 (28 N. W. 714); *Rhoades* v. *Railway Co.*, 58 Mich. 263 (25 N. W. 182).

In *Kwiotkowski* v. *Railway Co.*, 70 Mich. 549 (38 N. W. 463), a man in Detroit, carrying an umbrella on a dark and rainy night, with an opportunity to see for a distance of 20 feet, stepped on the track, and was struck by a train carrying a headlight capable of lighting the track for a block, and was killed. In the face of the presumption that he was not negligent (see *Underhill* v. *Railway Co.*, 81 Mich. 43 [45 N. W. 508], and *Mynning* v. *Railroad Co.*, 64 Mich. 102 [31 N. W. 147, 8 Am. St. Rep. 804]), the court held as matter of law that he did not look as he should have done, and was therefore guilty of contributory negligence. Per MORSE, J.

In *Gardner* v. *Railroad Co.*, 97 Mich. 240 (56 N. W. 603), Mr. Justice LONG, with the concurrence of all of his associates, applied the doctrine to a man who had looked at a distance of 20 feet from the track, and did not look both ways when two steps from the track, although his attention was diverted by a switch engine. He said:

"It was broad daylight, and, when within five feet of the north rail of the track, it is undisputed that the plaintiff could see 250 feet east along the main track. No one disputes that, if he had but looked, he certainly would have seen the train. It is evident, therefore, that he did not look, or, if he did, he saw the train, and carelessly attempted to cross in front of it; and in either case he was guilty of such negligence as to preclude a recovery. *Brady* v. *Railroad Co.*, 81 Mich. 616 (45 N. W. 1110);

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Pzolla v. *Railroad Co.*, 54 Mich. 273 (20 N. W. 71); *Grostick* v. *Railroad Co.*, 90 Mich. 594 (51 N. W. 667). If the plaintiff's attention was diverted by the switch engine, as he claims, it is no excuse for not looking for the approach of a train. He was to pass a dangerous point. He knew there was danger there. He was bound to exercise that degree of care that the situation and surroundings demanded of a prudent and careful person. If the switch engine was making a noise by its bell and by letting off steam, it, at least, was not an obstruction to his view to the east, and it is not so claimed. If he had looked eastward, he would have seen the train before he stepped upon the track. The ringing of the bell and the blowing off of steam from the switch engine did not relieve him from the duty of looking in the other direction. One look eastward, and one less step taken, and he would not have been upon the track. Upon any theory of the case, it was the duty of the court to direct the verdict in favor of the defendant."

Again, in *Houghton* v. *Railway Co.*, 99 Mich. 308 (58 N. W. 314), we held:

"A traveler is never justified in assuming that he can surely drive a certain distance, and cross a railroad track, before a train can reach the crossing, unless it be shown that he has had an uninterrupted view of the track for so great a distance as to justify such assumption."

It will be noticed that we there recognized the doctrine of the cases upon which the plaintiff relies in this case, but held it not applicable to that case.

The case of *McGee* v. *Railway Co.*, 102 Mich. 107 (60 N. W. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507), written by Mr. Justice LONG, related to an electric road. Plaintiff testified that he stopped at the curb, looked both ways, and saw the car with a headlight a block and a half away to the south. He did not expect a car from the north and did not see any. He did not look north again, and was struck. Mr. Justice LONG, said:

"We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway than that one must look and listen before crossing a street car track upon which the motive power is electric-

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ity or the cable. In this State it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop, before attempting the crossing. Electric street car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. If the view is unobstructed, and the pedestrian takes this precaution, there is not much opportunity for him to be injured. It will not do to say that he has discharged his responsibility, in case of an accident, by looking when some feet away, for he may miscalculate the distance and the speed of the car. To avoid danger he must look just before he enters upon the track."

Borschall v. *Railway*, 115 Mich. 473 (73 N. W. 551), was a case where the plaintiff crossed one track safely, to be struck by a car going in an opposite direction. The court said, Mr. Justice LONG writing the opinion:

"We think the court was correct in saying that the plaintiff was guilty of contributory negligence. There can be no question upon this record but that, had he looked before entering upon this track, he must have seen the car approaching Elizabeth street. If he did not look, he was clearly guilty of negligence, for, in the absence of something to excuse the performance of that duty, it was incumbent upon him, before attempting to cross, to take proper means of ascertaining whether the way was clear. *Fritz* v. *Railway Co.*, 105 Mich. 50 (62 N. W. 1007). If he saw the car coming, and then attempted to cross, he took his chances of being injured, and cannot complain."

In *Henderson* v. *Railway Co.*, 116 Mich. 374 (74 N. W. 525), Mr. Justice MONTGOMERY applied this rule to a boy who was crossing a double track:

"It is evident that this verdict cannot stand, but the more doubtful question is presented as to whether the first request of defendant should have been given. In my opinion, upon this record it should have been. See *Ecliff* v. *Railway Co.*, 64 Mich. 196 (31 N. W. 180). The plaintiff himself testified that this boy had intelligence enough to appreciate the danger. He placed the boy on the stand, and he so testified. The evidence clearly shows

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that there was nothing, except this wagon and the east-bound car, to obstruct the vision. Witnesses for the plaintiff state that, if the boy had looked in the direction of the car, he could have seen it. It was but common prudence in crossing such a thoroughfare to look, not only for the car, but for any vehicle which might be coming. Injury would have occurred from collision with an ordinary wagon just as surely as from running into this car; and from the testimony of the lad himself, he had intelligence enough at the time to know this. Why, then, should it be left for the jury to say that he had not?"

In *McCarthy* v. *Railway Co.*, 120 Mich. 400 (79 N. W. 631), Mr. Justice GRANT, with the concurrence of all sitting, held:

"A person of mature years, familiar with the situation at a street railway crossing, who went behind a passing car and upon a parallel track, where she was struck by a car approaching from the opposite direction, was guilty of contributory negligence, where the tracks were five feet apart and there was no obstacle preventing her from seeing the car which caused the injury, had she looked for it after the first car had passed."

In that case the plaintiff had walked about 15 feet without looking.

In *Davis* v. *Railway*, 162 Mich. 240 (127 N. W. 323), we affirmed a verdict for defendant by direction; Mr. Justice BLAIR writing the opinion, concurred in by his associates. The case was much like this. The plaintiff did look when near the track. Plaintiff testified:

"*Q.* Now, after you looked and had the sleet in your eyes, you advanced a step and was struck by the car?

"*A.* No, sir; I had looked a ways before I got to the track, and then started to go across, or I started on; I could not see; I did not see no car; I started on.

"*Q.* The reason you could not see was because you had this sudden gust and sleet?

"*A.* Yes, sir.

"*Q.* That is the reason you could not see?

"*A.* Yes, sir. * * *

"*Q.* You gave up a car coming from the west when you were farther back?

"*A.* I was looking; I could not see towards the west.

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"*Q.* You could not see because your eyes were blinded?
"*A.* Yes, sir.
"*Q.* Farther back?
"*A.* Yes, sir.
"*Q.* You could not see because your eyes were blinded?
"*A.* Yes, sir. I started on. I had given up the other car."

The Court said:

"If plaintiff could not see because of the sudden gust blowing the sleet in her eyes, she should have awaited the cessation of the gust, and it was negligence on her part to proceed to cross, relying upon such a view."

The defendant's counsel contend that the foregoing rule should not apply where the car has been seen and the plaintiff supposed she had time to cross in front of the car with safety.

In *Chauvin* v. *Railway*, 135 Mich. 85 (97 N. W. 160), we said, *when the plaintiff had looked and seen the cars*, that the circumstances were such as to make it an open question whether, in the exercise of *common prudence* (*having looked just before entering on the track*), he might *reasonably* have thought there was time to drive across in safety. The same rule is applied to a pedestrian in *McQuisten* v. *Railway Co.*, 147 Mich. 67 (110 N. W. 118), where the plaintiff looked immediately before entering upon the track. The case was a close one, but we declined to hold that it should have been taken from the jury. It was distinctly put upon the ground that, if in common prudence he had *reasonable ground for thinking* that he had time to cross, he was not negligent.

Again, *Beck* v. *Railroad Co.*, 156 Mich. 252 (120 N. W. 983), was another close case. The circumstances were peculiar, and the opportunity of looking immediately before going upon the track was absent by reason of box cars on an intervening track. The plaintiff was alert and stopped at the last opportunity, a short distance from the track, and looked and listened. He heard no train and saw no smoke, and a majority of the court thought

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the trial court did not err in leaving the question of plaintiff's negligence to the jury. It was a close question, and we resolved doubts in favor of a submission of the question to the jury. We think it rightly decided. It falls short of laying down a rule for cases such as that before us now.

The crucial principle in this class of cases is that one who neglects to look for a car when there is an unobstructed view, just before entering upon the track, and is struck by a car before he can walk directly across, is guilty of a neglect of duty in not assuring or reassuring himself that there is not a car directly upon him, of which situation the fact that he is struck is conclusive proof.

We have never held that one may safely rely upon his belief that he has time to cross, or that he may prudently take a chance, and it is only when, after satisfying himself by looking and ascertaining where the car is, he may in the exercise of common prudence reasonably think that he can proceed with safety, that a court or jury may find an absence of negligence. We have held this to be the rule repeatedly, and the learned circuit judge understood the cases and applied the right rule. To say that there is no negligence where one believes he can cross in safety, would send every case to the jury, for we must presume that no one attempts to cross, doubting the safety of the attempt. But many are careless and absent-minded, and the question must turn on the reasonableness of the attempt to cross.

The duty of the court to direct a verdict when a *prima facie* case is not made out, *i. e.*, when all the evidence with proper inferences therefrom would be insufficient to support a verdict, is clear. A very full discussion of this question will be found in a note to the case of *People* v. *Insurance Exchange*, 2 L. R. A. 340, 341, where many cases from this and many other States are cited.

The judgment is affirmed.

McALVAY and BROOKE, JJ., concurred. MOORE and BLAIR, JJ., concurred in the result.

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DETROIT SAVINGS BANK *v.* LOVELAND.

1. ESTOPPEL—CONTRACTS—CORPORATIONS.
   Where a contractor, pending negotiations with a mining company as to the sinking of a shaft for the purpose of mining rock salt, proceeded under an oral agreement with certain of the directors to do preliminary work, for which they were to be liable, but the corporation thereafter passed a resolution accepting the contractor's bid, and continued for several months to make advancements to the contractor, who continued to sink the shaft until the corporation had incurred an indebtedness of upwards of $7,000, and where he at no time advised the directors of his intention to hold them personally, or advised them of the progress of the work, but did acts inconsistent with such a theory, he is estopped to claim a personal liability.

2. SAME—DEFINITION.
   Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself.

3. CONTRACTS—MEETING OF MINDS—MUTUALITY.
   The necessary elements of a valid contract were lacking between the contractor and the directors, since their undertaking did not extend to the entire cost of sinking the shaft, but to preliminary work, which was not determined by the arrangement.

Error to Wayne; Mandell, J. Submitted November 14, 1910. (Docket No. 19.) Decided March 31, 1911. Rehearing denied March 30, 1912.

Assumpsit by the Detroit Savings Bank, assignee of George E. Currie, against Ralph Loveland, John A. Russell, George W. Williams, and George N. Skinner, for labor and materials furnished. Judgment for plaintiff. Defendant Loveland brings error. Reversed.

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Weadock & Weadock, for appellant.

Sidney T. Miller and *Henry C. Walters* (*James Cosslett Smith*, of counsel), for appellee.

BROOKE, J. Plaintiff, as assignee of one George E. Currie, recovered a judgment against defendant in the sum of $8,672.81.

The declaration is in assumpsit and is accompanied by a bill of particulars which shows that the judgment represents the cost of partially sinking a shaft for a salt mine near the city of Detroit, less certain sums paid thereon, for which defendant is given credit. Defendant brings the case to this court for review by writ of error.

It appears that plaintiff's assignor, Currie, had, prior to 1901, for many years been engaged as a contractor, building railways, sewers, pavements, etc. Some time in the year 1900 one William H. Ashwell, a mining and civil engineer of some repute, having knowledge that a stratum of rock salt existed several hundred feet beneath the surface of the ground in the vicinity of the River Rouge, near Detroit, conceived the idea that it was practicable to sink a shaft to the stratum of salt and to profitably mine the same. He proceeded to prepare plans and specifications for such a shaft and submitted them to Currie, who, on December 1, 1900, submitted a tender to Ashwell to sink the shaft 800 feet for $120,000. This tender provided that, if he secured the contract, he would subscribe for $12,000 of 7 per cent. accumulative, preference stock in the undertaking. From this tender, with its proviso, it is clear that at the inception of the project Currie contemplated entering into a contract for the sinking of the shaft, with a company thereafter to be formed, in which he himself proposed to become a stockholder to the amount of $12,000. Ashwell thereupon secured an option upon the land, necessary for the enterprise, from the Ecorse Land & Improvement Company. On January 12, 1901, the Michigan Rock Salt Company was organized with an

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authorized capital of $10,000. On the same day the stockholders met and authorized an increase in capital to $600,000, half common and half preferred, authorized the taking over of the Ashwell option, and the sale of 8,000 shares of its preferred stock, to provide funds for the sinking of the shaft, etc.

On November 20, 1901, John A. Russell, vice president of the Michigan Rock Salt Company, wrote the following letter to Currie:

"DETROIT, Nov. 20, 1901.

"GEORGE E. CURRIE, Esq.,
"Detroit, Mich.

"I enclose herewith a copy of Mr. Ashwell's specifications for shaft sinking. The form of contract which he offers is the ordinary simple form, referring to the specifications and drawings and making them a part of the contract, the contract itself simply providing for the full purchase price.

"Yours truly,
"JOHN A. RUSSELL."

It appears that at the same time a draft contract was sent to Currie by Russell, as follows:

"This agreement, made and entered into this thirtieth day of November, 1901, between the Michigan Rock Salt Company, a corporation having its office and place of business in Ecorse, Wayne county, Michigan, party of the first part, and George E. Currie, of Detroit, Wayne county, Michigan, party of the second part, witnesseth: That the said party of the second part, in consideration of the agreement of the said party of the first part herein contained, hereby covenants and agrees to and with the above named Michigan Rock Salt Company, party of the first part herein, that he will at his own cost and expense furnish all the labor and such materials as may be required therefor, and in accordance with the plans and specifications designated as contract No. 1 for the sinking of a shaft for a rock salt mine in Ecorse township, Wayne county, Michigan, within the time and in the manner herein provided, for the sum of one hundred twenty thousand ($120,000.00) dollars, being at the rate of one hundred fifty ($150) dollars of shaft sunk, per foot, and no

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greater price than one hundred and fifty dollars per foot shall be paid for any additional depth.

"The said contract shall be done in a substantial, thorough and workmanlike manner, and in all respects in accordance with and as specified and required in and by the plans and specifications of the said Michigan Rock Salt Company, hereto attached and forming a part of this contract, and the materials used shall be of the kind and quality named and required in said plans and specifications.

"Said contract shall be fully performed and completed in the manner herein required on or before the expiration of twelve months from the date of this contract. Said plans and specifications being attached hereto and dated of even date herewith, and signed by the president and secretary of the said Michigan Rock Salt Company, and a duplicate copy hereof signed by the party of the second part hereto. In witness whereof, the party of the second part has set his hand hereto, and the said Michigan Rock Salt Company has caused this instrument to be subscribed by its president and secretary, this 30th day of November, 1901, and its corporate seal to be attached thereto.

"[Signed].....[L. S.]
"Michigan Rock Salt Company.
"By.....President.
"By.....Secretary.

"Examined and approved, Detroit, November 30th, 1901.

"[Signed].....Engineer.

"Examined and approved as to legal sufficiency and correctness, Detroit, November 30th, 1901.

"[Signed].....Attorney."

The specifications accompanying this contract were very full; we call attention to but a few sections:

"Instructions.—The contractor must follow strictly without delay, all instructions and orders given by the engineer in the performance of his work. * * *

"Compressors.—The company will provide free of expense to the contractor, an air compressing plant, of adequate capacity, for his use during the progress of the work herein specified, etc.

"Security.—As security for the proper performance of the work, a bond acceptable to the company of an amount

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equal to the full amount of the contract, will be required, and the company will pay at the times specified, only ninety (90) per cent. of the monthly estimates of the work properly performed and materials furnished, after deducting all charges against the contractor, retaining the ten (10) per cent. until the completion of the contract and the final acceptance of the work. The cost of the bond shall be paid by the company."

Prior to and during the month of November, 1901, subscriptions had been solicited to the preferred stock of the Michigan Rock Salt Company by those interested in its promotion. As a result some 3,600 shares of a par value of $25 each were subscribed. The first seven subscriptions were as follows:

John A. Russell	400
Wm. H. Ashwell	100
Geo. N. Skinner	120
Geo. N. Skinner, trustee	480
M. I. Sullivan	120
Geo. E. Currie (subject to tender of December 1, 1900)	480
Ralph Loveland	200

Desiring to interest other capitalists in the enterprise, it was, on November 23, 1901, arranged between Russell and Currie that Currie should at once go upon the lands of the company and commence work upon the shaft, so that when prospective investors were taken to the site it would be found that work was actually in progress, and that the project was feasible. The expense of this preliminary work, amounting to $57.94, was personally guaranteed to Currie by Russell. This was the situation on November 30, 1901, when an inspection trip was arranged, so that intending investors might see the property. Among those who went upon this trip were Currie, Russell, Ashwell, Williams, Skinner, and Griffin. Currie testifies that defendant Loveland was likewise of the party. Loveland denies that he was present. Skinner likewise swears that Loveland was not present, and Russell and Williams state that they cannot recall the presence of Loveland upon

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that occasion. This action is predicated solely upon what is alleged by Currie to have occurred between himself and defendant Loveland at that time.

Currie testifies:

"After we got down to the place where we commenced operation, they looked around a while and then these gentlemen, Mr. Loveland, Mr. Russell, Mr. Skinner, and Mr. Williams, gathered in a little knot, probably 60 or 75 feet from the shaft, and after they had that conversation Mr. Loveland came over to me and said they had decided to have me go right ahead with the work, and he said, 'We will personally be responsible for what you do here until we notify you to stop,' and on that assurance I stayed there."

On the afternoon of the same day on which this alleged conversation took place, a meeting of the directors of the Michigan Rock Salt Company was held, at which were present directors Ashwell, Loveland, Russell, Williams, and Skinner. At this meeting resolutions were adopted:

(1) Authorizing the hiring of W. H. Ashwell & Co. as engineers.
(2) Directing the delivery of the bonds of the company for a deed of the company's land.
(3) Authorizing the negotiation of leases.
(4) Directing a call to be made upon preferred stock subscribers for an installment of 25 per cent.
(5) Defining the policy of the company.
(6) "*Resolved:* That the tender of George E. Currie for the sinking of a shaft for the mining of rock salt from the company's property be, and the same is hereby, accepted, and that the president and secretary be instructed to enter into a contract with him for the execution of the work under the plans and specifications of William H. Ashwell & Co., the said contract to be for the sum of $120,000 for the sinking of a shaft 800 feet in depth, and to provide explicitly that for any greater depth sunk, the contractor shall receive payment at the rate of $150 per foot, and no more."

Currie continued to work upon the shaft to June 28, 1902, when, without orders from anybody, he abandoned

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it because of nonpayment for work performed. During this period he was paid by the Michigan Rock Salt Company, upon estimates furnished by W. H. Ashwell & Co., engineers, the following sums: January 18, 1902, $800; January 21st, $1,000; January 24th, $1,000; February 15th, $500; February 18th, $300; February 19th, $200; February 10th, $750; March 8th, $400; April 26th, $300; June 5th, $250; June 7th, $200; and June 28th, $750.

The method of payment is illustrated by Exhibit 6 which follows:

"DETROIT, MICH., Jan. 17th, 1902. No. 1.
"THE FIRST NATIONAL BANK OF DETROIT:
"Pay to the order of George E. Currie ..... $800.00.
"Eight hundred dollars.
"Michigan Rock Salt Company,
"By EMORY WENDELL, Treasurer.
"JOHN A. RUSSELL, Vice President."

Indorsed on back as follows: "Geo. E. Currie."
Stamped: "Paid, Jan. 18, 1902."

"DETROIT, MICH., Jan. 17, 1902.
"MICHIGAN ROCK SALT COMPANY,
"To GEORGE E. CURRIE, Dr.
"Jan. 17, 1902.
"On account of estimate for construction of shaft, $800,00.
"Correct: THOMAS E. GRIFFIN, Secretary.
"Approved: JOHN A. RUSSELL, Vice President.
"$800.00. Received Jan. 17, 1902, from Michigan Rock Salt Company, eight hundred ($800) dollars.
"GEORGE E. CURRIE."

Indorsed on back:

"Check No. 1. Voucher No. 1.
"Michigan Rock Salt Company.
"Name: GEORGE E. CURRIE.
"Date, Jan. 17, 1902.
"$800.00. Chargeable to shaft sinking, $800.00."

On January 23, 1902, Currie wrote the following letter:

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"Office of GEO. E. CURRIE,
"GENERAL CONTRACTOR,
"1250 JEFFERSON AVENUE,
"DETROIT, January 23, 1902.

"MICHIGAN ROCK SALT CO., City.

"*Gentlemen:* We are now ready to use the steam air compressing plant which you have agreed to furnish for the prosecution of the work of shaft sinking. We are operating a pump at a depth of 60 feet with steam and have no way of purifying the air in the shaft, where the fumes of sulphur are so strong that it is difficult for the men to work in the shaft at present.

"In about three days we will reach the rock and it will be impossible to do any drilling without compressed air. I have three Sergeant drills on the ground and have an organized force of men and am prepared to prosecute the work vigorously, but can do absolutely nothing until you comply with your part of the agreement.

"Yours respectfully,
"GEORGE E. CURRIE."

On February 20, 1902, he again wrote:

"DETROIT, Feb. 20, 1902.

"MICHIGAN ROCK SALT CO., City.

"*Gentlemen:* I find it absolutely impossible for me to continue the work of sinking shaft unless I receive my pay as fast as the work is done. I have built 72 feet of shaft with 12-inch wall which would amount to $10,800.00, and 80 per cent. of it, the amount I should have received, amounts to $8,640.00. On this amount I have received $4,550.00, which leaves a balance due me of $4,090.00.

"In addition to this I have relined about 60 feet of the shaft. In consideration of relining the shaft down to the rock, I was to be permitted to build a shaft 12 feet in diameter inside, all the way down in lieu of 15 feet as originally intended.

"If I am compelled to stop work through lack of funds I will expect to be paid for this extra work at a price to be agreed upon between your engineer and myself. Unless I receive the $4,090.00 on or before Saturday, February 22nd, I shall be compelled to stop work on that date and will hold you responsible for all losses occasioned by suspending work.

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"Trusting you will take immediate steps to avoid this inconvenience, I am,

"Yours respectfully,

"GEO. E. CURRIE."

After this letter was written the company made five payments to Currie, amounting to nearly $2,000, but as the work continued the balance in his favor grew larger until, in June when he quit, it amounted to some $7,000.

On November 14, 1902, Currie wrote:

"Office of GEORGE E. CURRIE,
"GENERAL CONTRACTOR,
"1250 JEFFERSON AVENUE.
"DETROIT, MICH., Nov. 14, 1902.

"MICHIGAN ROCK SALT CO., City.

"*Gentlemen:* Unless we can adjust the amount of your indebtedness to me and make a satisfactory settlement in the very near future, I will be compelled to bring suit to get a settlement.

"Yours respectfully,

"GEO. E. CURRIE."

Soon after the writing of this letter, Currie claims to have written letters to defendant Loveland and to Skinner, Russell, and Williams, demanding payment. He kept no copy of the letters, and their receipt was denied.

The account for the labor and material furnished by Currie for this work was carried upon his books under the caption "Michigan Rock Salt Co., Shaft Contract."

After the abandonment of the work by Currie, matters seem to have remained stationary for more than three years, when, on July 22, 1905, this suit was commenced.

At no time during the progress of the work did Currie advise defendant Loveland of its condition, or demand payment therefor as it became due. On the contrary, he presented his estimates to Mr. Russell, the vice president of the Michigan Rock Salt Company, and continually urged that company to respond by paying. He did the work according to the plans and specifications prepared by the engineers of the Michigan Rock Salt Company and accepted the estimates of those engineers.

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It will be remembered that the specifications required Currie to give a bond for the faithful performance of the contract, which was to be paid for by the company. Attempting to comply with this provision, Currie made written application for such bond. The company applied to, having refused to issue it, he executed a personal bond to the Michigan Rock Salt Company and himself secured the signatures of sureties thereon. The specifications likewise required the company to furnish, at its own expense, an air-compressing plant for Currie's use during the progress of the work. After he had been at work nearly two months and had earned, according to the terms of his contract, $9,000, he wrote the letter of January 23, 1902, to the Michigan Rock Salt Company calling attention to the fact that he was ready for the air compressor and stating that:

"I am prepared to prosecute the work vigorously, but can do absolutely nothing *until you comply with your part of the agreement.*"

Every act of Currie's from November 30, 1901, to November 14, 1902, is inconsistent with his claim that he had a contract with defendant Loveland, and is entirely consistent with the fact that he had, or believed he had, or expected to have, a contract with the Michigan Rock Salt Company, and did the work in question in reliance thereon. It is the claim of the defendant that the plaintiff, who is the assignee of Currie, and is in no better position than he, should be held to be estopped from recovery by reason of Currie's own acts, as to which there is no controversy upon this record.

Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself, express or implied. If one's conduct induces another to believe in the existence of certain facts, and the other acts thereon to his prejudice, the former is estopped to deny that the state of facts does in truth exist. 16 Cyc. p. 680, and cases there cited. Bigelow on Estoppel (5th Ed.), p. 570.

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Applying this familiar principle to the facts disclosed by this record, we are of opinion that it must be said that Currie, and therefore the plaintiff, is estopped from denying that the labor performed and material furnished were performed and furnished for the Michigan Rock Salt Company. It must be borne in mind that defendant Loveland was a director in the company, and that as such director the course of Currie's dealings with the company were within his knowledge. If the alleged conversation of November 30th actually occurred (a matter which we will discuss later), Currie's own acts thereafter were such as to lead Loveland to believe that he (Currie) was proceeding with the work, relying upon the resolution of that date awarding him the contract, rather than upon the conversation. Currie never notified him of his obligation under the conversation, advised him of the progress of the work, nor demanded pay from him during its progress. He went on, expending nearly $15,000, without one word of warning to the man he now claims to be liable for this large sum, and by his conduct leading that man to believe that the company, not himself, was held by him (Currie) to be responsible. He will not now be permitted to deny the legal effect of his own acts. *Maxwell* v. *Bridge Co.*, 41 Mich. 453 (2 N. W. 639); *Pearson* v. *Hardin*, 95 Mich. 360 (54 N. W. 904); *Peninsular Stove Co.* v. *Osmun*, 73 Mich. 570 (41 N. W. 693); *Fifth Nat. Bank of Grand Rapids* v. *Dunham*, 109 Mich. 23 (66 N. W. 670); *Schmoltz* v. *Schmoltz*, 116 Mich. 692 (75 N. W. 135); *Barnard* v. *Patterson*, 137 Mich. 633 (100 N. W. 893); *Great Western Smelting, etc., Co.* v. *Evening News Ass'n*, 139 Mich. 55 (102 N. W. 286); *Scripps* v. *Sweeney*, 160 Mich. 148 (125 N. W. 72).

Again, assuming that the conversation occurred, Did the minds of the parties meet in such manner as to produce a legal contract? It is unquestioned that the amount of work to be done by Currie and its cost to Loveland was not agreed upon. Currie himself testifies that

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he did not understand the undertaking of Loveland to extend to the entire contract of $120,000. He considered the arrangement merely temporary until the Michigan Rock Salt Company could so finance itself as to be able to take over the contract. At what time, or after how much work was performed, this was to be done, Currie was unable to state, and it is not claimed that Loveland fixed any time or amount. It would seem that the necessary elements of a valid contract are not present, though a conclusion to this effect is unnecessary, in view of our conclusions upon the question of estoppel. It is unnecessary to determine whether or not the conversation occurred on November 30, 1901, as alleged. It is sufficient to say that it is inherently improbable that defendant Loveland upon that occasion voluntarily undertook an obligation of such magnitude as the present demand indicates. The weight of the evidence is, in our opinion, against the alleged fact of its occurrence. It is, we think, clearly apparent from this record that Currie proceeded with the work, relying solely upon the credit of the Michigan Rock Salt Company, and that this situation continued until he found that credit exhausted, when he determined upon the course of action indicated by this suit.

The judgment is reversed, and a new trial ordered.

BIRD, MCALVAY, BLAIR, and STONE, JJ., concurred.

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MARTIN v. JERRY MADDEN SHINGLE CO.

1. MASTER AND SERVANT — PERSONAL INJURIES — WARNING AND INSTRUCTING SERVANT—CONTRIBUTORY NEGLIGENCE.
   It was a question of fact for the jury to determine whether or not an inexperienced employé who had not been warned of the danger of removing a sliver from between saws, and whose arm was jerked into the saw by a long sliver which he tried to remove, was guilty of negligence contributing to his injury.

2. SAME—SUFFICIENCY OF INSTRUCTION.
   The question of the sufficiency of his employer's instruction and of the necessity of warning the servant, who had been told to watch another employed at similar work, and had observed him for half an hour before commencing to work, was also for the jury.

3 SAME—ACTS OF FELLOW-SERVANT.
   Defendant having introduced evidence to show that plaintiff had received a warning from a servant of defendant not to remove splinters from the saw by hand, the court erred in charging the jury that he would be bound only by a warning from some person who was known by plaintiff to have had experience about gang saws.

Error to Delta; Flannigan, J. Submitted February 14, 1911. (Docket No. 160.) Decided March 31, 1911. Rehearing denied March 30, 1912.

Case by Frederick P. Martin against the Jerry Madden Shingle Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

G. R. Empson, for appellant.

John E. Tracy (*H. O. Fairchild*, of counsel), for appellee.

HOOKER, J. The plaintiff, a young man about 19 years of age, applied for work in defendant's sawmill, and was

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employed by the foreman to act as helper on a gang saw. It was his duty to remove the lumber as it came from the gang saws, and the accumulations of sawdust, etc., for which a pole was provided. He was directed to watch another helper perform his duties, and see how his work was done. This he did for about half an hour before beginning work as helper. A few days later a sliver became fast between two of the saws, and he attempted to remove it, standing back of the saws at the time. He took hold of it with his hand and attempted to pull it out, and instantly his arm came in contact with the saw and was injured, so that amputation became necessary. He was unable to explain just how it happened, but his counsel's theory was that, owing to the tendency of the back teeth of the saw to move upward and forward, the stick was caught and dragged forward, taking his hand and arm with it. He testified that the stick protruded beyond the saws about eight inches, and he took hold of the four inches farthest from the saw. The negligence charged is, in substance, that defendant failed to warn the plaintiff of the danger attendant upon the removal of slivers from the saws. Upon the part of the defense, it was claimed that he was properly instructed in the performance of his duty, that the danger was obvious, and that, moreover, he had been distinctly warned by two persons, and was guilty of contributory negligence. A judgment for $2,500 has been appealed from by the defendant.

In the light of what happened, it is easily seen that seizing a stick as this defendant did was a most dangerous course to take, and a jury might readily and properly conclude that an inexperienced young man, whose attention had never been called to the subject, would be unlikely to understand, or even consider, the possibility of the consequences of the movement of the saw toward the front. That it was a serious menace to any one who should take hold of a sliver is now apparent. We are not satisfied that this was so obvious a danger as to justify our taking the question from the jury, or to say that the

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direction to watch another helper is a sufficient instruction, where there are particular dangers attendant upon the operation of a machine, that might not, and perhaps would not, and in this case did not, become apparent to the operator. Instruction may be incomplete, if it does not warn against serious known dangers not necessarily apparent, or if it fails to advise the novice of the safer way, when the danger is not obvious to the uninitiated. We think this case, though a close one, falls within the rule laid down in *Allen* v. *Jakel*, 115 Mich. 484 (73 N. W. 555); *Ertz* v. *Pierson*, 130 Mich. 160 (89 N. W. 680); *Kolodziejski* v. *Seestadt*, 143 Mich. 38 (106 N. W. 557); and *Braasch* v. *Stove Co.*, 147 Mich. 676 (111 N. W. 197).

We do not lose sight of the fact that a buzz saw is so obviously dangerous that, as was said in *Willis* v. *Besser-Churchill Co.*, 126 Mich. 659 (86 N. W. 133):

"It does not require a very high degree of intelligence to know that a rapidly revolving saw, more than four feet in diameter, is a source of danger to any one working in its immediate vicinity."

"Plaintiff must be held to have known that the method adopted by him was unsafe, and, having been informed of a safe way to do the work, he would be guilty of contributory negligence in adopting the unsafe way."

See, also, *Wight* v. *Railroad Co.*, 161 Mich. 216 (126 N. W. 414); *Van Wyck* v. *Dickinson*, 148 Mich. 418 (111 N. W. 1033); *Johnson* v. *Hovey*, 98 Mich. 343 (57 N. W. 172); *Torongo* v. *Salliotte*, 99 Mich. 41 (57 N. W. 1042); *Lindstrand* v. *Lumber Co.*, 65 Mich. 254 (32 N. W. 427). The distinction between those cases and the one now before us is in the character of the danger, and the uncertainty that it would be understood or foreseen by one unfamiliar with such saws, and the failure to warn against a danger which the master must have known.

We do not mean to be understood that a warning must be given against all sorts of dangers, obvious and rare, as

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well as concealed, but inevitable. The latter should be explained, and instruction as to the safer way given, and the reason made plain. A case distinctly in point is *Parkhurst* v. *Johnson*, 50 Mich. 70 (15 N. W. 107, 45 Am. Rep. 28). See, also, *Reynolds* v. *Railroad Co.*, 64 Vt. 66 (24 Atl. 134, 33 Am. St. Rep. 908); *Ingerman* v. *Moore*, 90 Cal. 410 (27 Pac. 306, 25 Am. St. Rep. 138); *Pullman's Palace Car Co.* v. *Harkins*, 55 Fed. 932, 5 C. C. A. 326; *Pullman's Palace Car Co.* v. *Laack*, 143 Ill. 242 (32 N. E. 285, 18 L. R. A. 215); 26 Cyc. pp. 1172, 1173, and note 35. In *Sullivan* v. *Manufacturing Co.*, 113 Mass. 399, the court said on this subject:

"It may frequently happen that the dangers of a particular position for, or mode of doing work, are great, and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent, to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and, although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely without instructions or cautions which he did not receive."

The claim of contributory negligence raised a question for the jury. There was testimony in the case that one Noel, a filer, twice warned the plaintiff against using his hands to remove sticks and slivers from the machine. The testimony was disputed. After retiring, the jury returned, and asked the court:

"Would a warning given by another employé constitute a warning, and prevent the plaintiff from recovering?"

The court then said:

"If another employé warned the plaintiff that it was

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dangerous to attempt to remove slivers by means of his hands, the plaintiff was bound to give heed to such warning; and if, after such warning by another employé, he used his hand, he would be guilty of contributory negligence, and cannot recover: Provided, you find that the employé who gave him such warning, notice, or caution was known by the plaintiff to be an employé experienced in and about the gang saws."

It is urged that the limitation, by the proviso, to men whom plaintiff knew to be experienced in and about the gang saws, was error. The case of *Sullivan* v. *Manufacturing Co.*, *supra*, is in point here, as it affirmed the following instruction:

"The plaintiff contended that any cautions given by the overseer would not avail to protect the defendant. But the court ruled that, if the plaintiff had such instruction, caution, information, or knowledge as would enable him, with a reasonable exercise of care on his part, to do his work with safety to himself, the defendant was not liable, and that it made no difference whether he derived it from the defendant's officers, from a second hand in another part of the room, from a stranger, or from his own perceptions and intelligence."

The proviso was erroneous, and the judgment is reversed, and a new trial ordered.

MOORE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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DETROIT TRUST CO. *v.* HUNRATH.

1. INTERPLEADER—DEFINITION—NATURE.
   A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter.

2. SAME—LANDLORD AND TENANT—LEASES.
   A landlord, who leased premises and subsequently made a second lease, subject to the first, providing that the subsequent lessee should have possession on default of the first, may not maintain a bill of interpleader against the tenants because the subsequent lessee claims that the prior tenant has violated the terms of his lease by subletting without stipulated written consent of the landlord.

3. SAME—DESCENT AND DISTRIBUTION—PARTIES.
   The guardian of one of the landlord's heirs has no greater right to file such bill than had the ancestor.

4. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS—BILL OF PEACE—ADEQUATE REMEDY AT LAW.
   Nor may a landlord, who has successively leased the same premises to different persons, compel them to answer a bill in equity on the ground that it would avoid a multiplicity of suits.

5. SAME—GUARDIAN AND WARD—INSTRUCTIONS OF COURT.
   Nor is the guardian of one of the heirs succeeding to an interest in such premises entitled to litigate the rights of the respective tenants as joint defendants in equity, on the theory that such guardian is entitled to instructions from the court.

Appeal from Wayne; Hosmer, J. Submitted February 24, 1911. (Docket No. 164.) Decided May 8, 1911. Rehearing denied March 30, 1912.

Bill of interpleader by the Detroit Trust Company, as guardian of Alvin J. Beller, against Otto Hunrath, the State Street Land Company, Louis M. Knauss, Anna P.

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Beller, Jessie B. Haldi, Marion B. Rennie, Alexander Beller, and Frederick Beller. From a decree sustaining a demurrer to complainant's bill, it appeals. Affirmed.

Beaumont, Smith & Harris and *Charles F. Delbridge* (*Orla B. Taylor*, of counsel), for complainant.

Stevenson, Carpenter & Butzel (*Alex. J. Groesbeck*, of counsel), for defendant Hunrath.

Henderson, Martindale & Grose, for defendants Beller.

Richard G. Kirchner, for defendant State Street Land Company.

HOOKER, J. The complainant's bill alleges that Jacob Beller made several leases of certain premises which came to the ownership of one Knauss. Apparently these are not important. It also alleges an agreement between Beller and Knauss made November 10, 1900, reciting the making of a lease of the same day to Knauss, and the holding of the premises by Richter under a lease to him expiring in 1910, the actual occupancy of the premises by Knauss under an agreement with Richter, and providing other and new covenants as to repair. The bill alleges, further, that in 1904 Otto Hunrath bought the interest of Knauss in the leases and premises under an agreement in writing and has paid rent to Beller; that said leases to Richter and the extension thereof expired May 1, 1910. It is alleged, further, that on June 6, 1907, Jacob Beller and wife made a written contract with some men named Moebs agreeing to sell to them the premises, subject to the "conditions of the leases and agreements," copies being attached, and—

"Subject also to whatever rights one Otto Hunrath, an occupant of said premises, may have therein by virtue of a sublease from said Knauss or otherwise; it being understood and agreed that said parties of the first part have not consented in writing to the sublease or assignment to said Hunrath of the leases herein referred to; and said

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first parties agree forthwith after the full payment by the said second parties of the purchase money at the time and in the manner hereinafter mentioned, and the performance of all the conditions herein specified to be both done and performed, to execute and cause to be executed and delivered a good and sufficient warranty deed for the said premises, and also to deliver or cause to be delivered to the said parties of the second part, their heirs, executors, administrators, or assigns, possession of the said premises on the first day of May, A. D. 1920, free and clear from all liens, incumbrances, leases, taxes, both ordinary and extraordinary and any and all other claims upon said property." Also:

"It is further mutually agreed that in case default shall be made in any of the covenants of any of the leases or agreements hereinbefore referred to, by the respective lessees, or their heirs, personal representatives or assigns, then said parties of the first part shall immediately take possession of said premises and shall immediately execute a lease thereof to the parties of the second part for the unexpired portion of the term of the lease, or leases, so in default, said lease to be upon the same terms and conditions as those contained in the lease or leases so in default, and to deliver the possession of said premises to said parties of the second part under said lease. And said parties of the second part agree to immediately execute such lease or leases for said unexpired term, as lessees, and to perform all the terms and conditions thereof on their part to be performed as such lessees."

Jacob Beller having died on June 12, 1909, William and George Moebs, the vendees, assigned to the State Street Land Company. The bill alleges that an agreement was made on April 13, 1910, between all of the defendants, except Knauss and Hunrath, being then the wife and children of Beller, and the complainant, as guardian of Alvin J. Beller, a minor grandchild of Beller, whereby the complainant was constituted and appointed guardian of said minor for purposes set forth in the agreement, some of which are stated therein; the agreement not being set forth in the bill or record.

The purposes stated are the collection by the complainant of the rents, interests, and income to become due upon

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certain leases, note, and contracts including those hereinbefore mentioned, and, after compensating itself, dividing the remainder between the other parties to that agreement. The estate of Beller has been probated, and the residue of the estate assigned by an order of the probate court. The bill alleges, further, that the State Street Land Company now claims to be owner of the premises, and on May 14, 1910, served on complainant as agent the following notice:

"DETROIT, MICHIGAN, May 13, 1910.
"DETROIT TRUST COMPANY, Agent,
"Detroit, Michigan.
"*Gentlemen:*

"The State Street Land Company hereby gives you as agent of and for the heirs of Jacob Beller notice and demands: That said heirs of Jacob Beller take possession of and execute a lease of the premises described in a certain land contract entered into on the sixth (6) day of June, A. D. 1907, between Jacob Beller and Anna Paulina Beller, his wife, parties of the first part, and William D. C. Moebs and George Moebs, parties of the second part, according to the terms of said contract.

"Very truly yours,
"STATE STREET LAND COMPANY,
"By W. BROOKS.'

It alleges further:

"That said State Street Land Company avers that, by the terms of the lease to Louis M. Knauss, said Louis M. Knauss could not sell, assign, or transfer the same without written consent of Jacob Beller. That such written consent was never given. That said Louis M. Knauss has executed an assignment of said lease and delivered possession to Otto Hunrath. That said Otto Hunrath is now wrongfully in possession of said premises. That by the terms of the contract of sale from Jacob Beller and wife to William D. C. Moebs and George Moebs, being Exhibit F hereto attached, said widow and heirs at law of said Jacob Beller are bound to evict said Otto Hunrath and take possession of said premises and execute a lease thereof to said State Street Land Company as assignee of said William D. C. Moebs and George Moebs according to the terms of said contract (Exhibit F), and said State Street Land Company, having served the foregoing notice

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upon the Detroit Trust Company as agent of said widow and heirs at law of said Jacob Beller, deceased, now threatens to sue said widow and heirs at law for damages for breach of the terms of said contract (Exhibit F), provided said widow and heirs at law do not at once evict said Otto Hunrath and take possession of said premises, and execute a lease thereof to said State Street Land Company.

"(21) That on or about the 28th day of April, A. D. 1910, said Otto Hunrath delivered to said Detroit Trust Company as agent for said widow and heirs at law of said Jacob Beller, deceased, a check for the sum of six hundred sixty-six and $\frac{67}{100}$ dollars ($666.67) as rent for said premises from May 1, 1910, to June 1, 1910.

"(22) That on the 30th day of April, A. D. 1910, said Detroit Trust Company as such agent returned said check to said Otto Hunrath, together with a letter in the words and figures following:

"'April 30, 1910.

"'Trust No. 808.

"'Mr. OTTO HUNRATH,

"'11 State St.,

"'Detroit, Michigan.

"'*Dear Sir:*

"'We have your letter of April 28th, 1910, enclosing check to our order as agent for the sum of $666.67, intended as rental of the premises occupied by you from May 1st, 1910, to June 1st, 1910. We also have a proposed surety bond signed by Julius Stroh to insure the performance of the terms of a certain lease executed on November 10, 1900, between Jacob Beller and Louis M. Knauss, and which lease you now claim to own. The authority received by us from all the members of the Beller family, of which you have had notice, authorizing us to collect rent, is not broad enough to permit us to accept this rent in such a manner as to recognize any rights you may have under the lease above referred to. Under the terms of the agency agreement referred to we would not have power to bind the members of the family.

"'We, therefore, return herewith the surety bond and the check and must decline to accept the same until we have been so instructed by the various parties in interest. It will be impossible to get instructions in less than three weeks by reason of the fact that Mrs. Haldi resides in British Columbia. We will, however, immediately correspond with all the parties in interest and obtain instructions from them at as early a date as possible as to what they wish to have done in the premises.

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"'As guardian of Alvin J. Beller, a minor, we shall also have to present the matter to the probate court for instructions.

"'The fact that you are allowed to remain in possession while we are obtaining instructions from all of the members of the Beller family is not to be considered in any way as a consent to your holding over, or a waiver of any of their rights.

"'Yours respectfully,

"'DETROIT TRUST COMPANY,

"'J. A. B., Asst. Secretary.'

"(23) That thereafter said Otto Hunrath again delivered to said Detroit Trust Company said check for said May rent.

"(24) That thereafter said Detroit Trust Company as such agent communicated with said widow and heirs at law of said Jacob Beller, deceased, but was unable to obtain authority from the widow and heirs at law of said Jacob Beller, deceased, to accept said rent from said Otto Hunrath in such a manner as to recognize any rights which he might have under the leases above referred to.

"(25) That on or about the 31st day of May, A. D. 1910, said Otto Hunrath delivered to said Detroit Trust Company as agent for said widow and heirs at law of said Jacob Beller, deceased, a check for the sum of six hundred sixty-six and $\frac{67}{100}$ dollars ($666.67) as rent for said premises from June 1, 1910, to July 1, 1910, and this complainant is informed and believes, and therefore charges the fact to be, that said Otto Hunrath will continue from month to month to tender said rent for said premises to said Detroit Trust Company as such agent.

"(26) That said Otto Hunrath avers that he is the owner of the lease (Exhibit D) by assignment thereof from said Louis M. Knauss, and that by virtue thereof he is entitled to the possession of said premises until May 1, 1920.

"(27) That this complainant is unable to determine whether said State Street Land Company or said Otto Hunrath, or either of them, is correct in its or his claims, and complainant fears that by recognizing the claims of one, or by authorizing said Detroit Trust Company as such agent to recognize the claims of one, it will lay itself or its minor ward, Alvin J. Beller, legally liable to damages to the other.

"(28) That this complainant represents to this court that on behalf of Alvin J. Beller, its minor ward, it is and

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always has been ready and willing to accept the proffered rent from said Otto Hunrath or to authorize said Detroit Trust Company as such agent on behalf of said minor heir to accept said rent from said Otto Hunrath, and to recognize his tenancy of said premises and his right of possession thereof under said leases and the assignment thereof or on behalf of said Alvin J. Beller, a minor, to take or authorize the necessary proceedings to be taken for the regaining of possession of said premises from said Otto Hunrath, and to execute on behalf of said minor a lease of said premises to said State Street Land Company as provided for in the above-mentioned land contract between said Jacob Beller and wife and said William D. C. and George Moebs, but fears that without the order of this court, after a just and fair interpleading of the various parties in interest so that their rights in connection therewith may be determined, that either action would lay this complainant or its minor ward liable for damages, but this complainant stands ready and willing to do and perform such things in regard thereto as shall by this court be deemed lawful and proper upon the determination of the various claims and interests of the parties made defendants hereto.

"(29) Complainant further represents that it does not in any respect collude with either of the said named defendants touching the matters in controversy in this cause, nor is it in any manner indemnified by the defendants or either of them, nor has it exhibited this its bill of interpleader at the request of the defendants or either of them, but merely at its own free will and to avoid being molested, vexed, and harassed touching the matters contained herein and to avoid being held liable for damages, either personally or as guardian of said minor liable to damages, and that the order of this court may be obtained so that complainant may properly and safely perform its trust as guardian of said minor.

"(30) That the amount involved in said controversy is more than $100 and that complainant has no full, complete, and adequate remedy at law, and therefore prays for the following relief in equity."

The bill prays:

"(*a*) That the above-named defendants appear and answer this bill of complaint, but not under oath; their several answers under oath being hereby expressly waived.

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"(*b*) That the defendants may severally set forth their various claims in connection with the matters set forth in the foregoing bill of complaint, and how in particular they make out their said claims.

"(*c*) That the defendants may interplead and settle and adjust their said demands between themselves, complainant being willing and desirous and agreeing to abide by the determination of this court in respect thereto and to recognize the claims of whichever defendant this court shall deem are right and lawful.

"(*d*) That the rights of all parties hereto be adjudicated by this court and that this complainant be instructed by this court as to his duties in connection with the matters involved in this controversy, so that complainant may properly and safely perform its trust as guardian of said Alvin J. Beller, a minor.

"(*e*) That if the court should find that Otto Hunrath was not rightfully in possession of said premises known as Nos. 11 and 13, State Street, Detroit, Mich., then that said Otto Hunrath may be decreed to vacate, give up, and surrender the possession of said premises to the complainant as guardian of said Alvin J. Beller, and to the other heirs of said Jacob Beller, deceased, and that a decree may be entered canceling the lease of said premises from said Jacob Beller to Louis M. Knauss, the term of which said lease extends from May 1, 1910, to April 30, 1920, or the assignment thereof from Louis M. Knauss to said Otto Hunrath, or both such lease and assignment, and that said Otto Hunrath and said Louis M. Knauss be required to pay to complainant guardian of said Alvin J. Beller and the other heirs of Jacob Beller, deceased, rent for the use and occupation of said premises from and after May 1, 1910, until said Otto Hunrath shall vacate said premises as aforesaid.

"(*f*) That in case the court should find that there had been no breach of the covenants of the lease from said Jacob Beller to said Louis M. Knauss, the term of which lease extends from May 1, 1910, to April 30, 1920, and that said Otto Hunrath was rightfully in possession of said premises under said lease, then that the said defendant, the State Street Land Company, may be forever restrained by an order and injunction of this court from in any way interfering with the payment by said Otto Hunrath and the acceptance by said heirs of Jacob Beller, deceased, of any rent due from said Otto Hunrath to said

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heirs of Jacob Beller, deceased, and from making any claim against the said heirs of said Jacob Beller, deceased, to the possession of or for a lease of said premises during the occupancy thereof of the said Otto Hunrath for the term of said lease from May 1, 1910, to April 30, 1920.

"(*g*) That complainant may have such other or further relief in the premises as shall be agreeable to equity and good conscience."

Three defendants being heirs of Jacob Beller have answered, and asked the same relief that is asked in the bill. Two heirs and Hunrath and the State Street Land Company have demurred to the bill, upon the following grounds:

"(1) That the complainant has a full, complete, and adequate remedy at law.

"(2) That the complainant has not shown any right to compel interpleading of the defendants.

"(3) That complainant has such an interest in the subject-matter of the suit that it has no right to compel the defendants to interplead.

"(4) That there is no such privity between the parties as would entitle the complainant to compel the defendants to interplead.

"(5) That the subject-matter of said suit results from the voluntary actions of the complainant and Jacob Beller, through whom it holds, and therefore complainant is not entitled to compel defendants to interplead.

"(6) That complainant and the parties by, through, and under whom it claims are under contractual relations with the defendant Hunrath which are independent of any contract complainant has with any of the other defendants.

"(7) That under such independent contractual relations with Hunrath the duty of the complainant and the other Beller heirs might be determined without a decision of the controversy between the defendant Hunrath and the other defendants claiming a duty from the complainant.

The demurrer was sustained in the circuit court, and complainant has appealed.

Under the allegations of this bill we must conclude that Beller reserved the right to the rent to be collected from

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Hunrath so long as his (Hunrath's) rights should not be forfeited, and from the State Street Land Company, under an exactly similar lease to be given to them in case of such forfeiture, after the execution of its contract. Hunrath claims that his lease has not been forfeited, and, so far as we can learn from the bill, no steps have been taken to declare it forfeited, whether Hunrath's covenants have been broken or not. On the other hand, we are informed by the bill that the State Street Land Company claims that it is entitled to the lease upon the ground that Knauss executed to Hunrath an assignment of his leases without the assent of Beller, and put him in possession of the premises, whereby Hunrath is unlawfully in possession, and it threatens to sue the widow and heirs of Beller for damages for breach of Beller's contract to evict Hunrath, and execute a lease to the State Street Land Company. Now Hunrath is making no complaint. On the contrary, he has regularly tendered performance by paying rent and holding his possession. In fact, it does not appear that complainant or any of the defendants have demanded possession or ever claimed a forfeiture. Complainant has refused to accept rent, but only to prevent its being said that it has recognized Hunrath's title. We cannot fail to see from the prayer that the main object of the bill is to settle a triangular dispute and obtain a decree giving relief between all the parties, so that the complainant and those defendants in sympathy with him may be protected against being defeated by both Hunrath and the State Street Land Company. We understand that Hunrath will claim, should proceedings to convict him be brought, that, although Beller did not consent in writing to the lease made by Knauss, he waived his right to a forfeiture by recognizing him as a subtenant entitled to the premises, and repeatedly received rent from Hunrath, and that he has always kept the covenants of the lease to Knauss. On the other hand, we understand the position of the State Street Land Company to be that its contract was an agreement that Hunrath's sublease, not being assented to

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in writing by Beller, was subject to forfeiture at any time, that Beller agreed to forfeit it and evict Hunrath, and that it (the land company) had a right of action against the Beller heirs for damages for the failure to do these things.

Three grounds are given as a justification for filing this bill:

(1) That it is proper as a bill of interpleader.
(2) It will avoid a multiplicity of suits.
(3) The guardian needs and asks instruction as to its management of the ward's estate.

Interpleader. Were Beller living, a bill of interpleader would not lie in this case. We understood counsel to concede this, but whether he intended to do so or not the case of *Sprague* v. *Soule*, 35 Mich. 35, settles that question. Each of these two defendants—*i. e.*, Hunrath and the land company—is claiming express contract rights from Beller, who would be in no proper sense a stakeholder. The definition of "a bill of interpleader," as given by Adams' Equity, p. 202, is as follows:

"A bill of interpleader is a bill filed for the protection of a person from whom several persons claim legally or equitably the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. The equity is that the conflicting claimants should litigate the matter amongst themselves, without involving the stakeholder in their dispute."

The author adds:

"It is apparent from the definition already given that, in order to originate the equity of interpleader, three things are essential, viz.: (1) That the same thing, debt, or duty be claimed by both the parties against whom relief is asked; (2) that the party seeking relief have incurred no independent liability to either claimant; and (3) that he claim no interest in the matter. * * * The party seeking relief must have incurred no independent liability to either claimant."

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See *Stephenson* v. *Burdette*, 10 L. R. A. (N. S.) 758, note III, for a discussion of this subject. Thus in *Stanley* v. *Roberts*, 8 C. C. A. 305, s. c. 59 Fed. 836, the court said:

"The reason for, and the necessity of a strict enforcement of, the second rule is obvious. Parties claiming title to the thing in dispute ought not to be, and cannot properly be, compelled to litigate any rights but those in controversy between themselves. If the holder of the subject-matter in dispute has placed himself under an independent personal obligation to one or more of the claimants, by which his liability to deliver the thing or pay the debt in question may be determined without a decision of the controversy between the claimants, it is plain that no litigation between the latter can ascertain the rights of the holder or debtor upon his personal obligation. Nor does the fact that the latter claims that his personal agreement was obtained by the fraud or misrepresentation of the obligees relieve the embarrassment, or except the case from this rule. The question presented by such a claim arises entirely between the parties to the personal obligation of the holder or debtor. It is nothing to the other claimants, nor were they interested in, or proper parties to, the litigation over it. It would be a monstrous proposition that one who makes agreements with two persons to sell and deliver the same article to each of them could bring the article into court and compel the two purchasers to litigate the question which had the better right to the thing, before either could recover it of him, or that a tenant of the owner could take a second lease of the same premises from one claiming title to them, and then compel the real owner and the pretended owner to litigate, not only the title to the premises, but the validity of the leases the tenant himself had taken, before either lessor could recover his rent. If such a proposition could be sustained, any tenant might treat his landlord to as many lawsuits as he could obtain leases of his premises."

The foregoing quotations appear to us to sufficiently show that a bill of interpleader would not lie at the suit of Beller. The fact that the rights of Beller are now divided among several heirs who do not agree as to the policy to be pursued by the Beller interests against Hunrath and

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the land company should make no difference, and Hunrath has a right to make his defense against eviction without the embarrassment of a complication growing out of a possible breach of contract on the part of the Bellers, should he prevail, and, on the other hand, the State Street Land Company's claim of a breach of contract might suffer if in any way dependent upon a forfeiture of Hunrath's rights under the lease. Neither party should be subjected to the annoyance, expense, and danger of litigating claims of others against the Bellers growing out of different contracts.

Multiplicity of Suits. We have said that the avoidance of a multiplicity of suits is one ground given for the filing of this bill, which is perhaps too broad a statement. It may be more accurate to say that counsel argue it as a reason for filing the bill. That the avoidance of many suits may in certain kinds of cases justify the filing of a "bill of peace" is undoubted. We fail in an effort to find the subject of multiplicity of suits treated under any other head in Adams' Equity, and "multiplicity of suits" is not mentioned as a title in the index; but on page 199 the subject is mentioned, as follows:

"A bill of peace is a bill filed for securing an established legal title against the vexatious recurrence of litigation, whether by a numerous class insisting on the same right or by an individual reiterating an unsuccessful claim. The equity is that, if the right be established at law, it is entitled to adequate protection.

"Bills of peace of the first class are those where the same right is claimed by or against a numerous body, as, for example, where a person claims tithes against his parishioners, or the parishioners allege a *modus* against the parson, where the lord of a manor claims a right against the tenants, or the tenants claim a common right against the lord, or where the owner of an ancient mill claims service to his mill from all the tenants of a particular district. In all these cases the only form of procedure at common law would be that of a separate action by or against each parishioner or tenant, which would only be binding as between the immediate parties, and would

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leave the general right still open to litigation. In order to remedy this evil, a suit may be sustained in the court of chancery, in which all parties may be joined, either individually, or as represented by an adequate number. If any question of right be really in dispute, it will be referred to the decision of a court of law, and, when the general right has been fairly ascertained, an injunction will be granted against further litigation. If particular individuals have special grounds of claim, those claims will be left untouched.

"In order to originate this jurisdiction, it is essential that there be a single claim of right in all arising out of some privity or relationship with the plaintiff.

"A bill of peace therefore will not lie against independent trespassers, having no common claim, and no appearance of a common claim, to distinguish them from the rest of the community, as, for example, against several booksellers who have infringed a copyright, or against several persons who, at different times, have obstructed a ferry. For, if a bill of peace could be sustained in such a case, the injunction would be against all the people of the kingdom."

Also:

"Bills of peace of the second class are those where a right, claimed by an individual, is indefinitely litigated by him without success. The necessity for bills of this class originates in the nature of the action of ejectment, which is based on a fictitious dispute between fictitious parties, so that the rights of the real litigants are only indirectly tried. The consequence of this is that the result of the action is not conclusive, but that fresh actions may be repeatedly brought, and the successful party harassed by indefinite litigation. In order to remedy this oppression a jurisdiction has been assumed by the court of chancery, and a bill will lie, after repeated trials at law and satisfactory verdicts, to have an injunction against further litigation. The right to this jurisdiction was formerly much questioned. Lord Cowper, in a celebrated case, where the title to land had been five times tried in ejectment, and five uniform verdicts given, refused to exercise it; but his decision was overruled by the House of Lords."

Also:

"No bill of peace will lie where the rights and respon-

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sibilities of the defendants neither arise from nor depend upon, nor are in any way connected with, each other. *Randolph* v. *Kinney*, 3 Rand. (Va.) 394. See *Miller* v. *Grandy*, 13 Mich. 540; *Wilkerson* v. *Walters*, 1 Idaho, 564. An allegation that the defendants have fraudulently confederated to harass the plaintiff with suits will not uphold an injunction when the defendants claim adversely to each other. *McHenry* v. *Hazard*, 45 Barb. (N. Y.) 657. An injunction to restrain a multiplicity of suits will not lie when the court of law is competent to give relief by consolidating them. High on Injunctions, § 62; *Washburn's Appeal*, 105 Pa. 480."

This bill shows that the Beller heirs are liable to litigation against two different persons arising upon two different contracts not necessarily in any way dependent upon each other. They are apprehensive that they may suffer successive defeats in these, and this bill is apparently expected to enable the complainant to safely recognize Hunrath's lease, or, on the other hand, obtain a decree for his eviction, and thereby enable it to carry out its contract with the State Street Land Company and avoid a suit for damage. We have already seen that the latter's right to damages for the breach of its contract does not necessarily depend upon complainant's right to enforce a forfeiture, and if a bill of peace would be otherwise appropriate—which we do not intimate—the same reason exists for denying its use here, that we have given with regard to a bill of interpleader. These parties have a right to try their claims separately, and have them decided on their own merits without reference to the others' rights under the separate and respective contracts.

Instruction to the Guardian. It is conceded by counsel that equity will entertain an application from a trustee for the construction of writings in certain cases. It is a common practice to file bills for the construction of wills, but we are not asked to construe any writing. What complainant evidently seeks is to get a decision between Hunrath and the State Street Land Company, and between the Beller heirs and them, which shall bind all, and

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would require the determination of fact as well as law. We have not been referred to any case which justifies the practice that we are asked to sustain in this case, nor have we been able to find one which supports complainant's claim.

The order is affirmed, and cause remanded for further proceedings.

BIRD, MOORE, BROOKE, and STONE, JJ., concurred.

NATIONAL COAL CO. v. CINCINNATI GAS COKE, COAL & MINING CO.

1. PROCESS — APPEARANCE AS WAIVER — SERVICE ON NONRESIDENTS—FOREIGN CORPORATIONS.
   By a voluntary appearance and by consenting to a stipulation extending the time to plead in an action of assumpsit, on a claim that accrued outside of the State, a foreign corporation whose president was served with process while temporarily within the State waives its right to question the validity of such service, and submits itself to the jurisdiction of the court.

2. SAME—APPEARANCE—EXTENSION OF TIME—PLEA.
   The object of such stipulation extending the time to plead is consistent only with a general appearance.

Certiorari to St. Clair; Tappan, J. Submitted April 11, 1911. (Docket No. 33.) Decided June 2, 1911.

Assumpsit by the National Coal Company against the Cincinnati Gas Coke, Coal & Mining Company. An order overruling a motion to quash the service of process is reviewed by defendant on certiorari. Affirmed.

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Walsh & Walsh, for appellant.

May & Dingeman, for appellee.

HOOKER, J. The parties to the action are foreign corporations; the plaintiff being a Maryland, and the defendant an Ohio, corporation. This action is assumpsit brought on a contract made by correspondence between their home offices. An ordinary summons was issued from the office of the clerk of St. Clair county on the 20th day of June, 1910, and was served personally on defendant's president in said county on the same day. On that day an affidavit in garnishment was filed in said office. Service of the writ of garnishment was duly made, and on July 13th a disclosure was filed. A declaration was filed in the main case on July 2, 1910. On July 21, 1910, the defendant, through its counsel, filed in said original cause a notice that Walsh & Walsh had been retained as attorneys for the defendant in said cause, and served a copy thereof on plaintiff's attorneys. On July 30, 1910, said attorneys and plaintiff's attorneys joined in a written stipulation that the defendant's time to file a plea and notice should be extended to September 10th.

On September 7, 1910, counsel for defendant filed in said cause a motion to quash the proceedings on the ground that the court did not obtain jurisdiction over the defendant. This motion was denied, and is here on certiorari, allowed on application of the defendant.

That a nonresident corporation may not ordinarily bring suit in this State against another nonresident corporation upon a contract which is neither made nor to be performed in this State, appears to be conceded by counsel, who cite *Grand Trunk R. Co.* v. *Wayne Circuit Judge*, 106 Mich. 248 (64 N. W. 17). That exact question was not raised in that case. It was there held that no provision was made by statute for the service of process upon a foreign corporation in an action brought by a resident of this State upon a cause of action which accrued in Canada.

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The only question argued by counsel for the appellant appears to have been that, as no statute of this State provided for service of a summons upon a nonresident corporation, the service upon defendant's president conferred no jurisdiction of the defendant, and it is to this point only that the case cited is in point.

Assumpsit is a transitory action, and, the court having jurisdiction over that class of actions, it had jurisdiction of the subject-matter, and we understand that this is not disputed. See 11 Cyc. p. 669; *Thompson* v. *Benefit Association*, 52 Mich. 522 (18 N. W. 247); *Daniels* v. *Railway Co.*, 163 Mich. 468, 476 (128 N. W. 797), and cases cited. Should it be conceded that this was not a good service, or even that there had been no service, and could be no valid service by which a defendant nonresident corporation could be forced to submit to the jurisdiction for the reason given, it does not follow that jurisdiction cannot be obtained by its consent.

By a voluntary appearance and by consent to a stipulation extending the time within which the defendant should plead, defendant submitted itself to the jurisdiction in this instance, as the rule applies to nonresidents as well as residents. 3 Cyc. p. 516, notes 4, 5; *Thompson* v. *Benefit Association, supra.* We held in that case:

"A nonresident waives his exemption from the process of even a local court of general jurisdiction if he does not object seasonably. The circuit courts of Michigan are courts of general jurisdiction, and can take cognizance of suits on contracts, irrespective of the locality of their origin, provided the parties by service of process or otherwise are before them."

See, also, *Conrode* v. *Wayne Circuit Judge*, 79 Mich. 332–338 (44 N. W. 623, 7 L. R. A. 511); *Ferguson* v. *Oliver*, 99 Mich. 161 (58 N. W. 43, 41 Am. St. Rep. 593).

The notice of retainer filed and served was general in its nature, no limitation appearing in it. 3 Cyc. p. 504 (4), pp. 511–513. The object of the extension of time is consistent only with a general appearance. 3 Cyc. p. 507.

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We think it unnecessary to discuss the claim of jurisdiction based on 3 Comp. Laws, § 10629.

The order of the circuit court is affirmed, and the cause remanded for further proceedings.

OSTRANDER, C. J., and BIRD, BLAIR, and STONE, JJ., concurred.

NATIONAL COAL CO. *v.* CINCINNATI GAS COKE, COAL & MINING CO.

1. SALES—CONTRACTS—DAMAGES FOR BREACH—PERFORMANCE—COAL.

   The term "West Virginia Smokeless coal," used in a contract for the sale of a quantity of coal, was, under the undisputed evidence, a trade term used to describe coal mined in a certain district, and defendant could not recoup for plaintiff's failure to deliver a literally smokeless coal if the coal delivered corresponded to the description.

2. SAME.

   It was a proper question for the jury, under conflicting evidence, whether or not the coal delivered conformed to the contract on which plaintiff brought suit.

3. SAME—PROFITS—QUALITY—RECOUPMENT.

   Upon defendant's notice of recoupment, it was entitled to recover the difference between the contract price and the price at which coal of a similar quality could be purchased in the open market, and without proper pleadings and proof that defendant could not purchase the same coal elsewhere and had no opportunity to furnish a substitute, it could not recover the profits lost.

4. TRIAL—CROSS-EXAMINATION—STATUTES.

   Plaintiff was authorized, under Act No. 307, Pub. Acts 1909, to subpoena and call for cross-examination an agent of defendant who, at the time of the sale, was in defendant's employ.

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Error to Kent; Perkins, J. Submitted April 13, 1911. (Docket No. 77.) Decided July 5, 1911. Rehearing denied March 30, 1912.

Assumpsit by the National Coal Company against the Cincinnati Gas Coke, Coal & Mining Company for goods sold and delivered. Judgment for plaintiff. Defendant brings error. Affirmed.

George C. Brown, for appellant.

May & Dingeman, for appellee.

STONE, J. The plaintiff is a miner, and wholesale shipper and dealer in coal, having its offices in Baltimore, Md. The defendant is also a wholesale coal dealer, having its offices at Cincinnati, Ohio. This action is brought to recover $380.21, and interest, the balance claimed by plaintiff to be due it from defendant for coal sold to defendant under a written contract, consisting of correspondence, for coal shipped by plaintiff directly to defendant's various customers, or on orders therefor being received from the defendant. The correspondence leading up to the contract was as follows: On April 27, 1907, the defendant wrote the plaintiff the following letter:

"CINCINNATI, O., April 27, 1907.

"NATIONAL COAL COMPANY,
"Baltimore, Md.

"*Gentlemen:*

"Will you kindly advise, as soon as possible, your very best inside figures on contracts, until April 1, 1908, on your steam grades; also the tonnage of each grade you wish to contract for, until the above mentioned date?

"Hoping to hear from you by return mail, we beg to remain,

"Very truly yours,
"THE CINCINNATI GAS COKE,
COAL AND MINING CO.,
[Signed] "P. A. KAIN, A. M. E. D."

To which letter the plaintiff replied as follows:

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"BALTIMORE, MD., May 2, 1907.
"THE CINCINNATI GAS COKE, COAL & MINING CO.,
"Traction Bldg.,
"Cincinnati, O.,
"*Gentlemen:*

"We can quote you on our mine run Fairmount coal 90c., ¾ one dollar, and West Virginia Smokeless mine run 85c. per tons of 2,000 lbs. f. o. b. cars at mines. Can offer you for immediate acceptance 25,000 tons of each of the above grades, on contract until April 1, 1908, at the figures quoted for shipment in equal monthly proportions. Will be pleased to hear further from you.

"Respectfully yours,
"NATIONAL COAL COMPANY,
[Signed] "A. J. RYAN."

To which letter the defendant replied as follows.

"CINCINNATI, O., May 14, 1907.
"NATIONAL COAL COMPANY,
"Baltimore, Md.
"*Gentlemen:*

"Referring to your favor of the 2nd inst., wish to advise that we hereby accept your proposition on 25,000 tons each of Fairmount run of mine coal, at $0.90 per net ton, and ¾ at $1.00 per net ton, and West Virginia Smokeless run of mine, at $0.85 per net ton, all f. o. b. cars mines, for shipments made between now and April 1, 1908, and will immediately commence to send in orders in equal monthly proportions.

"Our object in writing this letter is to have you reserve the above mentioned tonnage for us.

"Very truly yours,
"THE CINCINNATI GAS COKE, COAL & MINING CO.
[Signed] "P. A. KAIN, A. M. E. D."

The plaintiff replied to this letter as follows:

"BALTIMORE, MD., May 16, 1907.
"THE CINCINNATI GAS COKE, COAL & MINING CO.,
"Traction Bldg.,
"Cincinnati, O.
'*Gentlemen:*

"Your letter of May 14 to hand. We will accept proposition, subject to car supply, strikes and other accidents beyond our control. You to take the coal in equal monthly proportions, in any kind of equipment, steel hop-

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pers, wooden hoppers, and steel and wooden gondolas, whichever are available.

"Very respectfully yours,

"NATIONAL COAL COMPANY,

[Signed] "JOHN F. O'MEARA."

Prior to entering into this contract, the plaintiff had shipped the defendant a car load of coal represented to be West Virginia Smokeless coal. About 4,000 tons of coal were shipped under the contract, amounting to about $3,450, all of which had been settled for except the claimed balance here sued for.

The declaration was on the common counts in assumpsit. The plea was the general issue, with notice of recoupment by reason of inferior quality, poor preparation, and contracts with third parties canceled, and damages sustained thereon by defendant by reason of the coal not being smokeless coal, as was contracted for. On the trial defendant's recoupment was limited to the contract made by it with Fleischmann & Co., of Cincinnati, Ohio, to deliver certain of the coal contracted to be furnished by the plaintiff.

The principal question arising upon the trial was whether the plaintiff had complied with its contract by shipping West Virginia Smokeless coal on orders received therefor from defendant, it being claimed on behalf of the plaintiff on the trial that the term "West Virginia Smokeless" coal was a trade or commercial name, meaning any coal mined on the Grafton & Belington Branch of the Baltimore & Ohio Railroad. On the part of the plaintiff there was positive and direct evidence that "West Virginia Smokeless" is the name attributed to all that coal on the Grafton & Belington Branch of said railroad; that it is known commercially as "West Virginia Smokeless" coal; and that that was the kind of coal shipped by the plaintiff upon the defendant's orders from the district named; and plaintiff's evidence tended to show that it had performed its contract.

After the plaintiff's case was closed, and while defend-

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ant was offering evidence, the following occurred between court and counsel:

"*The Court:* Pardon me. It seems to me, Mr. Brown and Mr. May, that this case must stand or fall upon the proposition as to whether or not the coal furnished was West Virginia Smokeless coal, and as to whether or not West Virginia Smokeless coal, as shown by the trade, is gotten from these mines on the Baltimore & Ohio Branch between Grafton and Belington.

"*Mr. May:* I do not think there is anything else to the case, if your honor please, I never have thought so.

"*Mr. Brown:* No question about that being the basis of the case at all."

We have read this record very carefully, and it appears very clearly to have been the claim of the plaintiff, supported by testimony, that "West Virginia Smokeless" coal is the name attached and given to the coal mined and shipped on the Grafton & Belington Branch of the Baltimore & Ohio Railroad; that the same is known commercially as "West Virginia Smokeless" coal, and that all of the coal in question furnished by the plaintiff was taken from mines located on said branch. There was some evidence on the part of the defendant tending to question the claim of the plaintiff, and tending to show a breach of the contract by the plaintiff.

The trial judge refused to direct a verdict in the cause, but submitted the case to the jury under what appears to have been a very full and fair charge. The claims of the plaintiff were stated in the charge, in substance to be, that in each instance it claimed that the shipments made by it of the coal ordered by the defendant were in accordance with the terms and conditions of the contract as to the kind of coal shipped; that West Virginia Smokeless coal is a name known to the trade, and includes coal mined from the several mines on the Grafton & Belington Branch of the Baltimore & Ohio Railroad, in West Virginia. That it was claimed by plaintiff that the defendant knew, at the time the contract was entered into, where the coal covered by this contract was to come from,

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and from what particular mine; and, that later, during the transaction between them, the plaintiff claimed that the defendant learned through correspondence and otherwise, where the coal delivered under this contract came from, and was to come from in the future; and, after such knowledge, continued to place orders for coal to be delivered under the contract; that the defendant, from time to time, paid various amounts falling due under this contract for coal delivered, without complaint, until finally, after making a payment of $1,000 in January, 1908, it refused to pay the balance sought to be recovered in this action. That plaintiff further claimed that the contract was complied with on its part as to the kind and quality of coal to be delivered thereunder, and which was actually delivered thereunder.

The jury was also informed of the claim of the defendant in that it denied that the coal delivered under the contract by the plaintiff company was West Virginia Smokeless coal, as that coal is known to the trade; but insisted in its defense that other coal was delivered of a cheaper and inferior grade than that called for by the contract, and that, by reason of the failure on the part of the plaintiff to deliver the coal contracted for, it claimed to have suffered certain damages, which it sought to recoup against the plaintiff in the action.

After giving certain instructions as to the rules of evidence to be observed by the jury, the court used the following language, which is covered by defendant's eighth assignment of error:

"The question arises as to what constitutes, under the evidence in this case, West Virginia Smokeless coal. It is apparent that the term is but a trade-name, applied to a certain class of coal secured from a certain locality, and that the term 'smokeless,' does not technically mean that the coal will not emit smoke when burned; all coal, I apprehend, produces more or less smoke. As applied to this case, I instruct you that under the undisputed evidence in the case, West Virginia Smokeless coal, as the term was used in the contract between these parties, is

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such coal as was mined on the Grafton & Belington Branch of the Baltimore & Ohio Railroad, in West Virginia, and if you find that the coal furnished and delivered by the plaintiff to defendant, or on its order under this contract, was coal mined in the district named, your verdict will be for the plaintiff, for the amount claimed, with interest."

In the same connection, the court charged the jury, that if they found that the plaintiff in its performance of this contract, delivered coal from other mines than those upon the Grafton & Belington Branch of the Baltimore & Ohio Railroad, when the order called for West Virginia Smokeless coal, then, and in that case, if they so found, such delivery would not be in accordance with provisions of the contract; that if they failed to find that the coal delivered by the plaintiff was West Virginia Smokeless coal, as the contract provides, then they should consider the question of recoupment, and the defendant's damages. And upon the subject of recoupment the court, in charging the jury, used the following language, which is made the basis of defendant's ninth assignment of error:

"Where the coal was purchased as West Virginia Smokeless coal for resale, as is shown in this case, and it is not disputed, and where it is resold with the like representation as to character and kind, if you should find that it was resold by the defendant company to Fleischmann & Co., with the like representation as to character and kind, then and in that case, the defendant may recover the direct and natural loss it may have sustained, which loss would be the difference between the value of the coal it was entitled to under its contract, and the value of the coal the evidence shows the defendant actually received. In other words, the measure of defendant's damages will be the difference between the value of the coal delivered, and the value of the coal that should have been delivered, under the contract, at the place of delivery."

The seventh assignment of error is that the court erred in refusing defendant's second request to charge, which was as follows:

The damages defendant would be entitled to recover

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on the cancellation of such contracts, would be the difference between the cost of the coal to defendant, and the price it was receiving under such contracts with third parties."

The jury returned a verdict for the plaintiff for the full amount of its claim, with interest; and the defendant had brought the case into this court upon a bill of exceptions.

Recurring to the eighth assignment of error, defendant claims that the charge of the court, "that under the undisputed evidence in the case West Virginia Smokeless coal, as the term was used in the contract between these parties, is such coal as was mined on the Grafton & Belington Branch of the Baltimore & Ohio Railroad," was erroneous. It is very evident that counsel seeks to have the court construe the term "smokeless" literally, but we think, from a careful reading of the record, that it may be said to be undisputed that the term "West Virginia Smokeless" coal, had a commercial and trade significance and application, well known to the trade, and specifically known, as this record shows, to the agent of the defendant at the time the contract was entered into.

While it is true that some other grades of coal mined in West Virginia are sometimes designated as smokeless coal, the record fails to show that there is any coal characterized in the trade as "West Virginia Smokeless" coal, except that which was handled and sold by the plaintiff from the district named. All of the coal shipped bore a uniform freight rate, which indicated that it was mined at or near the same locality, and evidently upon the same branch of railroad, from which West Virginia Smokeless coal derives its name, as claimed by plaintiff. We think that the question was properly and fairly submitted by the trial judge to the jury; that the court did not err when it stated what the undisputed evidence in the case showed, and that the question of fact was properly left to the jury.

Referring to the seventh assignment of error, based upon the refusal to give defendant's second request, it

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should be borne in mind that there was no claim on the part of the defendant that, at the time of entering into the contract with the plaintiff, the latter had any knowledge of the subcontract, or any of the terms thereof, with Fleischmann & Co.

In any event, had it proven plaintiff responsible for the breach, the measure of damages would have been the difference between the price at which plaintiff agreed to sell coal of this particular character, and the price at which it could have been secured in the open market at the time and place of delivery. There is no evidence that the defendant was not able to get coal of the same quality elsewhere, and that it did not have an opportunity to furnish a substitute. We recognize the rule contended for by the defendant, but do not think that either by its pleadings or proof it is in a position to invoke the rule. The rule is that the measure of damages for failure to deliver goods sold, where they can be obtained in the open market, is the additional cost of the goods; where they cannot be obtained in the market, the purchaser is entitled to recover the profits lost through the fault of the seller. *F. W. Kavanaugh Manfg. Co.* v. *Rosen*, 132 Mich. 44 (92 N. W. 788, 102 Am. St. Rep. 378); *Den Bleyker* v. *Gaston*, 97 Mich. 354 (56 N. W. 763); *Thomas Iron Co.* v. *Jackson Iron Co.*, 131 Mich. 130 (91 N. W. 137). We think the charge of the court upon the subject of recoupment was as favorable to the defendant as it could have asked under this record. The jury found no occasion to apply any rule of damages on the subject of recoupment, as they found no breach of contract by plaintiff.

We have examined the other assignments of error, both as to the examination of the witness Kain and the refusal of the court to grant a new trial, but we discover no error in the manner in which the questions involved were disposed of by the trial court. The right of the plaintiff to call the witness Kain for cross-examination under Act No. 307, Pub. Acts 1909, cannot be questioned, it appearing that said witness was "a person who at the time of the

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happening of the transaction out of which such suit or proceeding grew was an employé or agent of the opposite party."

The judgment below will be affirmed.

OSTRANDER, C. J., and BIRD, HOOKER, and BLAIR, JJ., concurred.

ANDERSON *v.* MICHIGAN CENTRAL RAILROAD CO.

1. MASTER AND SERVANT—RISKS ASSUMED—RAILROADS—ROADBED AND TRACKS.

   There was no evidence tending to show that a derailment of a freight car, which collided with a pile of lumber near defendant's switch, killing plaintiff's decedent, was the proximate result of the switch being built on made ground on low land near the river, in an action for negligent death under the survival act, wherein it merely appeared that the rails at the joint near the place of derailment settled about two inches when a car passed over them; but in any event decedent, who had known the condition of such ground for several years, assumed any risk arising from that mode of construction.

2. SAME.

   Nor was there any evidence to warrant the trial court in submitting to the jury the questions whether the track was properly ballasted, or the joints thereof were upon a reasonably firm foundation.

3. SAME.

   Any lack of evidence that defendant claimed appeared in plaintiff's case upon the issue of the existence, at the time of decedent's injury, of defects discovered by plaintiff's witnesses a week later, was supplied by defendant's showing that when the track was repaired, after the accident, no change was made in the track, that it was merely restored to its previous condition.

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4. SAME—TRACK—GAUGE.
It was for the jury to say whether or not it was negligent for defendant to construct the track of the switch from one-half to nine-sixteenths of an inch narrower than the standard width upon the curve where decedent was killed.

5. SAME—RAILROADS—LUMBER PILED BESIDE RAILS—SWITCHES.
Where lumber was piled at the usual and convenient distance from the switch and could not reasonably have been piled at such a distance as to have prevented collision with a derailed car, no negligence could be predicated upon the location of the lumber pile.

6. SAME—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES.
The question of plaintiff's contributory negligence, in riding on the side of the car at the forward end upon the outside of the curve so that he was invisible to the engineer or fireman, was for the jury.

7. SAME.
And it was for the jury to say whether the derailment occurred by reason of the car's running over a piece of scantling that was afterwards found beside the track and bore marks of a car wheel.

Error to Bay; Collins, J. Submitted June 12, 1911. (Docket No. 35.) Decided September 29, 1911. Rehearing denied March 30, 1912.

Case by Anna M. Anderson, administratrix of the estate of Louis F. Anderson, deceased, against the Michigan Central Railroad Company, for the negligent injury and death of decedent. Judgment for plaintiff. Defendant brings error. Reversed.

Humphrey, Grant & Baker, for appellant.

Hall, Defoe & Henry, for appellee.

BROOKE, J. Plaintiff's decedent, a man of 49 or 50 years of age, had been employed by the defendant company as brakeman and switchman for upwards of 20 years, and as switchman in defendant's yards at Bay City for 18 years. Along the river, in the vicinity of Bay City, the banks are exceedingly low. Where those banks have for many years been occupied by lumber manufac-

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turing plants, it has been the custom to deposit slabs, edgings, and other mill refuse upon the banks of the stream, thus raising the level of the bank, and making ground upon which the product of the sawmills was piled. Over the ground thus filled in, defendant laid sidings into many Bay City mills, for the purpose of delivering logs to the mills and removing the manufactured lumber therefrom. The ground about the Richardson Lumber Company plant was thus filled in many years ago, and about the yard are several tracks and switches laid upon this so-called "made ground." The track upon which plaintiff's decedent lost his life was constructed in November, 1907.

On April 3, 1909, plaintiff's decedent was a member of a switching crew which had been handling cars over this track for many months. On that day the crew attempted to move a car, partially loaded with lumber, from where it stood upon a curve, to another position in the yard. The switch engine, after making a coupling, came to rest, and, while it was standing still, plaintiff's decedent walked forward to the front end of the car and climbed up into the stirrup, holding onto the ends of the boards, which were piled unevenly to a height of about 10 feet from the top of the flat car. He took this position on that side of the car, on the outside of the curve, where he could not be seen by either the engineer or fireman. The conductor and the other switchman remained on the inside of the curve. The engineer started to push the car forward in the usual manner, but had gone but a few feet when the front wheels of the front truck climbed the right-hand rail on the outside of the curve, and, after running from 4 to 7 feet, with the flange on top of the rail, it dropped off to the right and ran along on the ties for a few feet, until the front right-hand corner of the car came in contact with a pile of lumber alongside the track. As plaintiff's decedent was standing in the stirrup on this corner of the car, he was crushed between the lumber on the car and

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the pile alongside the track, receiving injuries from which he died the same day.

Plaintiff charged the defendant with negligence in the following particulars:

"(1) In that it omitted to provide, keep, and maintain in such yard a reasonably safe side track for such locomotive and cars to operate upon.

"(2) In that it omitted to provide, keep, and maintain in such yard a side track having a reasonably safe substructure for such locomotive and cars to operate upon.

"(3) In that it constructed and maintained said side track with the curve therein having sudden and abrupt departures from a uniform line.

"(4) In that it omitted to construct and maintain said side track with the outer rails of the curve thereof of a reasonably regular and established elevation.

"(5) In that it omitted to place, keep, and maintain ballast upon the surface and under said side track to make the same reasonably firm and solid.

"(6) In that it omitted to construct and maintain the rails of said side track of a reasonably uniform gauge.

"(7) In that it omitted to construct and maintain the joints in the rails of said side track upon a reasonably firm and solid foundation, so that they would not unduly depress when the said locomotive and cars were run over the same.

"(8) Having provided, constructed, kept, and maintained such side track with its substructure unsafe for locomotives and cars to operate upon, with a curve therein having sudden and abrupt departures from a uniform line, with the outer rail wanting in a reasonably regular and established elevation, without ballast or uniform gauge, with the outer rails of an irregular elevation and the joints therein having a foundation wanting in firmness and solidity, in that it omitted to require said lumber company, in piling its said lumber, to place the same at such reasonable distance from the rails of said track that when the cars thereon would mount and leave the same they would collide with such piles."

The son of plaintiff's decedent, in describing a portion of the track which the car passed over before it left the rail, testified in part as follows:

"I noticed the condition of the track and rail at a point

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about 400 feet east of the switch track on April 4th. There had not been any change in the track with reference to the rails and ballast when I went down there to take measurements on the 10th, a week from the accident.

"*Q.* Is this the time you saw cars being moved in, at one time?

"*A.* Yes; it is.

"*Q.* Did you notice on this day, also, the condition of the rails with reference to any joints, or joint, rather?

"*A.* I did. There was a joint in this track just before you got to the lumber pile, west from it. It was the inner rail. That would be the south rail. As you go in on the track, it first curves to the right; then it curves to the left. I made measurements to see how far this joint was from the switch where I started. It was 396.4 feet, as I remember it. That joint was a couple of inches lower than the rail opposite or across the track. That joint came between two ties. I measured the gauge or distance between the rails where that joint was, and found it was 4 feet $8\frac{7}{16}$ inches. The track did not keep that gauge as it went east. At a point a foot and one-half east of the joint the gauge was four feet nine inches and three-sixteenths. It was three-quarters of an inch wider at that point than a foot and a half back. I noticed marks on the left-hand rail, beginning east of the joint, 411 feet from the switch. That was where it left the rail. The mark was about 7 feet long and began 404 feet from the switch. That was the mark on top of the rail made by the flange leaving the rail. I followed that mark, and it led right to where the wheel had passed off the track. The marks on the ties show where the wheel passed off. The mark commences on the inside of the left-hand rail and travels about 7 feet diagonally across and towards the outside part of the rail. I measured and found the distance from the switch to where the lumber pile begins was 418 feet. The lumber pile was about 12 feet wide, so that it lay between a point 418 and 430 feet from the switch. When I was there on the 10th, I saw several cars pushed in there over this joint. They were pushed in by the locomotive, so that the locomotive was on the west end. Some of those cars were loaded. I would not say they all were. The first car farthest from the engine was loaded with logs. When that car passed over the joint, I stood just south of the joint opposite it, and about six or eight feet from the

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track. There was nothing between me and the joint to interfere with seeing what took place.

"*Q.* As the right-hand front wheel or trucks would pass over the joint, did you notice the effect on the opposite truck?

"*A.* They had a tendency to raise.

"*Q.* How much did the track settle at the joint as the car of logs passed over it?

"*A.* We had no way of measuring it, but I should say a couple of inches, two or three inches. * * * They fixed that track in there since the accident. I do not claim there is any different ground on the rail under the rail next to the river than there is under the east rail. It is just about the same—the same material. I say the outside rail raised and the inside one went down. It may have gone down, and it may have been stationary for all I know; but I know the train swayed when they went in there, which gives me the idea that the outside rail did not go down as far, or it did not go down at all as the inside rail; the inside rail went down the farthest."

Plaintiff offered no testimony tending to show that the existence of the alleged low joint or of a track gauge of 4 feet $8\frac{7}{16}$ inches would tend to cause the derailment. Upon cross-examination of one of defendant's witnesses, however, it appeared that the proper gauge upon a straight track was 4 feet $8\frac{1}{2}$ inches, and upon a 10-degree curve (such as the one in question) 4 feet 9 inches. This witness testified further:

"On a curve anything up to a 10-degree curve can be carried around on 4 feet $8\frac{1}{2}$ inches with safety. We do not on a curve ever reduce the gauge below 4 feet $8\frac{1}{2}$ inches. It would not be prudent to construct a standard-gauge railroad on a curve with the gauge less than 4 feet $8\frac{1}{2}$ inches at any place in it. If it were constructed of a narrower measurement than 4 feet $8\frac{1}{2}$ inches, it would bind the drivers of the engine, and the consequence would be that it would either turn the rails over or the engine would go off the track. The engine would not have sufficient gauge to carry it. The engine would go off from the rails spreading more than any other reason, with the proper flange. I do not know of anything that might contribute to make it go off, other than the rails spreading."

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It appeared affirmatively that the siding in question was built upon the same kind of "made ground" as were many others in the vicinity, and that plaintiff's decedent was thoroughly familiar with this fact. It further appeared that the track was ballasted in the ordinary way for such tracks. Plaintiff offered no proof tending to show that the pile of lumber with which the car collided was piled too close to the track; in fact, the record conclusively shows that it was piled at a safe distance from the track, in the ordinary operation of the road. Defendant's motion for a directed verdict at the close of plaintiff's case was denied. It then showed that the track in question was properly constructed and of the proper gauge at the point in question, when constructed.

The record showing the foregoing facts, the court charged the jury in part as follows:

"It is alleged by the plaintiff in her declaration in this cause that it is the duty of defendant:

"(1) To keep and maintain a reasonably safe side track for its locomotives and cars to operate on.

"(2) To provide, keep, and maintain side tracks having a reasonably safe substructure for the locomotives and cars to operate on.

"(3) To construct and maintain its side tracks without curves having sudden and abrupt departures from a straight line.

"(4) To construct and maintain side tracks with rails or curves of a reasonably regular and established elevation.

"(5) To keep and maintain the ballast on said side track in a reasonably firm and solid condition.

"(6) To construct and maintain the rails of its side tracks of a reasonably uniform gauge.

"(7) To construct and maintain the joints and rails of the side tracks upon a reasonably firm and solid foundation.

"(8) To require lumber companies in piling lumber to place the same a reasonable distance from the rails of the side track, so that when the cars would mount or leave the rails they would not collide with the piles.

"A breach of each one of these several allegations of duty is alleged in the said declaration, and I charge and

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instruct you that the plaintiff, having the affirmative of the case, assumes the burden of showing that, as a matter of law, these duties are imposed upon and assumed by said defendant, and also to prove by a preponderance of the evidence in the case a breach of one of these duties, and that the breach of such duties so imposed by law was the proximate cause of the accident resulting in the injury and death of plaintiff's decedent."

We think the court was in error in submitting to the jury the question of defendant's negligence as to points numbered 5, 7, and 8. Not only is there no evidence tending to show that any alleged insufficiency in the foundation of the track caused or intended to cause the derailment, but plaintiff's decedent, through his long experience, had become thoroughly acquainted with the fact that all, or at least many, of the side tracks in this vicinity were built upon this so-called "made ground," and he must be held to have assumed the risk, if any, which arose from this character of construction.

It is urged by defendant that there is no evidence that the claimed defects in the track existed at the time of the accident. It is true the measurements sworn to were taken a week after the accident, but defendant itself offered proof to the effect that in repairing the track after the accident no change had been made, but that it had only been put back in the condition it was at the time of the accident.

We think under the evidence as it appears in this record the question of defendant's negligence in permitting a gauge of less than 4 feet 8½ inches upon this curve was properly submitted to the jury. Whether in fact it did permit such a gauge was for the jury, and, if it did exist at the time of the accident, was that fact the proximate cause of the derailment.

No negligence on the part of defendant can be predicated upon the location of the lumber pile with which the car collided. It was piled at the usual and convenient distance from the track, and plaintiff's decedent had

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worked beside such piles for many years. It would be obviously impossible to hold that lumber should be piled at such a distance from the track that a derailed car could not collide with it. The car in question was 40 feet long, and it is possible that it might have been so operated as to come in contact with a pile of lumber that distance from the track.

We are asked to hold that plaintiff's decedent was guilty of contributory negligence, as a matter of law, in assuming the position he took upon the car. We cannot so hold. In the light of the actual occurrence, it is clear that he selected the only place upon the car where there was possibility of injury, but when he took that position it was one of apparent safety, and but for the derailment, which we do not think he was bound to anticipate, it would have remained safe. No duty called him to this particular spot on the car, but the record shows that in switching in the yards switchmen customarily ride wherever it is handiest to get on. The distance to be traveled is usually short, and the movement of the cars slow. A prudent man situated as was plaintiff's decedent might have selected a safer place, but his negligence must be determined by the jury.

Defendant urges that it offered the only intelligent solution of the question as to what caused the derailment. The finding of a piece of scantling alongside the track, at the point of derailment, bearing marks indicating that the car wheel had passed over it, is indeed persuasive evidence that this stick was the proximate cause of the accident. That theory was, however, submitted to the jury and apparently rejected. The cause of the derailment is a question of fact.

The judgment is reversed, and a new trial ordered.

OSTRANDER, C. J., and BIRD, BLAIR, and STONE, JJ., concurred.

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DILLON *v.* CRAIG

1. ASSUMPSIT — CASE — COUNTS — DECLARATION — MISJOINDER — ACTIONS.

   A count in a declaration purporting to be in case, charging that defendants, some of whom were creditors of plaintiff, as such, agreed that if plaintiff would permit a certain firm of adjusters to adjust plaintiff's loss by fire with several insurance companies that had issued policies to him, plaintiff might deposit the proceeds in a bank named by them, that instead of depositing the funds as agreed, the defendants, wilfully intending to injure plaintiff and deprive him of his policies of insurance, procured and permitted said adjusters to appropriate to their own use $10,000 of the funds collected, stated, in the absence of a demurrer, a sufficient cause of action in assumpsit instead of trespass on the case.

2. SAME—FRAUD.

   A second count, charging similar facts and alleging false pretenses, stated a cause of action for fraud, sufficient if not demurred to.

3. SAME—ELECTION.

   The misjoinder of causes of action should be raised by an appropriate pleading, but upon a motion to require an election between the counts, made at the commencement of the trial and again at the close of plaintiff's case, plaintiff should have been required to elect between them.

4. ESTOPPEL—DEBTOR AND CREDITOR—DUTY TO SPEAK.

   As to creditors of plaintiff with whom a compromise of his debts was effected, and from whom he concealed the fact that he intended to bring an action against certain of them for participating in the alleged wrongful conversion of the insurance funds, plaintiff was estopped from making the claim that they were liable to him, since they were entitled to full information concerning his assets, including such claim.

5. TROVER AND CONVERSION—FRAUD—INSURANCE FUNDS.

   There was evidence sufficient to present a question of fact as to one of the defendants who took charge of plaintiff's insurance matters, advised him to employ the defendant insurance adjusters to settle the amount of plaintiff's loss, and who

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turned over to the adjusters, against plaintiff's protest, an excessive amount as compensation for their services out of the proceeds of the insurance money, in contravention of plaintiff's agreement with his creditors.

6. SAME—RATIFICATION.

It was not a ratification of any alleged wrongful acts that plaintiff, after learning of the payment to the adjusters, indorsed over to them, in pursuance of his agreement with the creditors, other checks and drafts received.

Error to Wayne; Mandell, J. Submitted March 1, 1911. (Docket No. 67.) Decided November 3, 1911. Rehearing denied March 30, 1912.

Case and trover by Hugh Dillon against Frank D. Craig and others. A judgment for certain defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed as to a part of the defendants. Reversed as to defendant Fixel.

Sloman & Sloman (*James H. Pound*, of counsel), for appellant.

Bernard B. Selling, for appellees Fixel, Krolik and others.

Geer, Williams, Martin & Butler, for appellees Burnham, Stoepel & Co.

BLAIR, J. In the language of plaintiff's brief—

"Plaintiff brought this action of trespass on the case and trover against the defendants jointly to recover damages for unlawfully depriving him of certain policies of insurance, and of ten thousand ($10,000.00) dollars of money, etc., received by the defendants upon the adjustment of a fire loss thereunder."

The first count in the declaration, after reciting that plaintiff was engaged in the retail dry goods business, that on the 5th day of February (1907) a fire occurred, which destroyed a greater part of his stock, etc., that he had certain insurance policies covering said stock, etc.,

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the loss upon which was afterwards adjusted at $20,000, that Craig, Wright & Walker were engaged in the business of adjusting insurance losses, that Burnham, Stoepel & Co. and A. Krolik & Co. were engaged in the wholesale dry goods business, and were creditors of plaintiff, alleges—

"That shortly after the fire aforesaid, said defendants, Burnham, Stoepel & Co. and A. Krolik & Co., the former acting by their agent, George A. Corwin, and the latter by the defendants Adolphus Fixel and said Craig, Wright & Walker, agreed with plaintiff that if plaintiff would permit the defendants Craig, Wright & Walker, who had adjusted the fire loss under said policies, to collect (among other policies) the moneys due and owing thereon under their direction, that said moneys so collected would be deposited to the account of plaintiff in the Old Detroit National Bank in the city of Detroit. That, relying upon said agreement and understanding, plaintiff, on or about the 16th day of February, 1907, placed said policies of insurance, upon which there was then owing plaintiff the sums aforesaid, in the possession of the defendants Craig, Wright & Walker, to collect, under the supervision and control of said defendants Burnham, Stoepel & Co. and A. Krolik & Co., in order that the moneys collected therefrom should be deposited and placed to the credit of plaintiff in said bank.

"Plaintiff avers that on or about February 23, 1907, the moneys so due and owing upon said policies, respectively, were paid to the defendants Craig, Wright & Walker, and that it then and there became the duty of said defendants to deposit or procure the same to be deposited in said bank to said plaintiff's credit and account. That said defendants wholly neglected their duties and obligations in this regard, and did not deposit said moneys in said bank to the account and credit of plaintiff, but, wilfully intending to injure and harass plaintiff and deprive him of the said policies and the moneys owing thereon and so paid over to said defendants Craig, Wright & Walker, and acting in concert with said defendants Craig, Wright & Walker in relation thereto, caused, procured, and permitted the said defendants Craig, Wright & Walker to appropriate and convert to their own use the sum of ten thousand ($10,000) dollars of the said insurance moneys so paid over to them on account of said policies as

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aforesaid, whereby said plaintiff has sustained great loss and damage," etc.

The second count, in substance, follows the first down to the statement of the alleged grievances, which is as follows:

"That shortly after the fire aforesaid said defendants Burnham, Stoepel & Co. and A. Krolik & Co., the former acting by their agent, George A. Corwin, and the latter by the defendant Adolphus Fixel, acting in concert with the defendants Craig, Wright & Walker, and wrongfully intending to injure and harass the plaintiff and deprive him of his money and property, under the guise and pretense of befriending, aiding, and assisting him in conserving and protecting his interests, in that he might more easily and readily pay his creditors to whom he was then indebted, and to collect the moneys on the policies of insurance hereinbefore mentioned, and procure the deposit of the same to his credit and account in the old Detroit National Bank of the city of Detroit, then and there, to wit, February 16, 1907, while thus acting in concert with the defendants Craig, Wright & Walker, and having lulled said plaintiff into a false sense of security by sundry wiles and subtle devices, caused, procured, and induced plaintiff to place the policies aforesaid with the defendants Craig, Wright & Walker to collect and receive the money thereon, and which moneys the said defendants then and there assured and represented to plaintiff, when so collected or paid over to the defendants Craig, Wright & Walker, would be promptly deposited by said defendants in the old Detroit National Bank to the credit and account of said plaintiff.

"That in furtherance of said wrongful purposes to deprive plaintiff of his said moneys and property as aforesaid, the said defendants Burnham, Stoepel & Co., by their agents aforesaid, then and there acting in concert with said defendants Craig, Wright & Walker, and on or about the 23d day of February, 1907, caused and procured plaintiff to indorse and deliver to said Craig, Wright & Walker the checks and drafts given by the respective insurance companies in payment of their respective policies of insurance aforesaid, which were payable to plaintiff's order, and aggregated the amount of, to wit, $20,000. That by reason of the premises, the said defendants Craig, Wright & Walker came into the possession

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of said policies of insurance and the money owing and due thereon as aforesaid, and the drafts and checks given by said companies, respectively, in payment thereof.

"And the plaintiff avers that in further pursuance of said wrongful purposes, and wickedly intending then and there to wrong and deprive plaintiff of his said policies and the money due and owing and paid thereon, and the drafts and checks aforesaid delivered in payment thereof, the said defendants then and there failed and neglected and refused to deposit the moneys, checks, drafts, etc., so collected by and paid over to said defendants Craig, Wright & Walker in the said Old Detroit National Bank to the credit and account of the plaintiff, except a small portion thereof, and then and there caused, procured and permitted the said defendants Craig, Wright & Walker to retain, keep, and convert of said moneys the sum of, to wit, $10,000. That by reason of the premises said moneys so retained, kept, and converted by said defendants Craig, Wright & Walker became and were wholly lost to plaintiff, whereby he has sustained great damage," etc.

The third and fourth counts of the declaration are in trover, alleging, respectively, the conversion of the policies and the conversion of the drafts and moneys received thereon. The defendants pleaded the general issue alone, except Craig, Wright & Walker, who gave notice under their plea that the $10,000 was paid them for services rendered in adjusting the losses referred to in the declaration, pursuant to an express agreement.

Before any testimony was given, defendants requested the court to compel the plaintiff to elect upon which counts he expected to recover, alleging that the first count was in assumpsit and could not be joined with the counts in tort. This request was refused, without prejudice to renewing it when the proofs were in. Upon the conclusion of plaintiff's proofs, upon motion of defendants' counsel, the court directed a verdict for defendants Burnham, Stoepel & Co., A. Krolik & Co., and Adolphus Fixel, and ordered the case to proceed as to Craig, Wright & Walker.

The grounds upon which the verdict was directed were, as stated by the court:

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"I find and determine that the evidence shows that the plaintiff secured, through his authorized agent, a settlement which was advantageous to himself, and involving a loss to these defendants, at a time when he entertained a secret and purposely undisclosed intention of subsequently claiming damages for wrongs which he seeks in this suit to recover. By his silence he sought to gain advantage, and, under the approved doctrine that one cannot be permitted to gain an advantage by remaining silent when it is his duty to speak, the plaintiff is now estopped from urging his further claim, and from denying that the settlement effected was of all outstanding claims against the defendants. Defendants are not shown to have known of the contemplated claims, and there is no reason given why they should have known. On the contrary, every legitimate inference is that they did not know or suspect until long after accepting 90 cents on the dollar of the claim. It cannot be successfully urged that this claim is of a different class than the one compromised by the plaintiff at 90 cents on the dollar, or that each claim was independent of the other, for the reason that the amount of assets plaintiff was able to marshal in order to compromise his obligations was material to the determination by defendants of how much or how little they would be willing to accept in payment of their claims, and the intentional concealment of the asset of $10,000 worked a disadvantage to the defendants as well as to the other creditors of the plaintiff. This would dispose of the case against these defendants, but I think in view of the character of the charges they are entitled to a ruling by the court upon the other charges.

"To repeat what I said a moment ago about the charges generally, these defendants are charged, to speak in a general way, with having joined with the defendant firm of Craig, Wright & Walker, in an unlawful conspiracy to fraudulently deprive the plaintiff of some $10,000; and, second, with the unlawful conversion of insurance policies, drafts for insurance moneys, and insurance moneys. There is no positive proof that there ever was a direct undertaking between the defendants to commit a fraud upon plaintiff, but plaintiff claims that such an undertaking is established by inference from the acts and conduct of the defendants. It would profit nothing to enter into a detailed discussion of the evidence that it is claimed establishes the charges in the declaration. Suffice

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it to say, I find and determine that the evidence construed most favorably against these defendants fails to raise a presumption against them under the charges and wording of the declaration, and the jury would be unwarranted in holding them guilty under the evidence presented."

Judgment was entered upon the directed verdict, to review which plaintiff prosecutes this writ of error.

On February 5, 1907, a fire occurred in the plaintiff's store, which caused great damage to his stock of goods. He had his stock of goods insured in different amounts by a large number of insurance companies; the total amount of insurance being about $76,000. At the time of the fire, plaintiff was indebted to about 100 creditors in the amount of $70,000 to $75,000.

Mr. Geo. A. Corwin was the secretary and credit man of Burnham, Stoepel & Co., and Adolphus Fixel was the credit man of A. Krolik & Co. As such credit men, Corwin and Fixel had charge of the collection of the indebtedness due from plaintiff to their principals, amounting, in the case of Burnham, Stoepel & Co., to the sum of $14,000, and in the case of A. Krolik & Co., to $10,000. The declaration proceeds upon the theory that the principals acted only through their agents, and there is no testimony in the record indicating, either directly or indirectly, that the principals specially authorized the payment of the $10,000 to Craig, Wright & Walker, or ratified the payment after knowledge of the facts. Neither is there any evidence tending to show that the principals conspired in any way to defraud or injure plaintiff, or indicating any desire to take advantage of his necessities or to do anything inconsistent with fair treatment. So far as the record discloses, no part of the $10,000 went to them, but, on the contrary, its payment diminished the amount which they received. Their liability, if any, must rest upon the doctrine of *respondeat superior*. The defendants put in no testimony.

In our opinion, the first count should be treated as stating a cause of action in assumpsit, and, in the absence of

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a demurrer, the second count sufficiently states a cause of action in trespass on the case for fraud. *Storrs* v. *City of Grand Rapids*, 110 Mich. 483 (68 N. W. 258).

Although the misjoinder of causes of action ought strictly to have been raised by an appropriate pleading, still we think that the election insisted upon by defendants at the outset and again at the close of plaintiff's proofs should have been ordered. *Haines* v. *Beach*, 90 Mich. 563 (51 N. W. 644); *Doyle* v. *Pelton*, 134 Mich. 398 (96 N. W. 483).

Does the doctrine of estoppel apply? Plaintiff arranged with Mr. Joseph L. Hudson to obtain a settlement with his creditors, which Mr. Hudson secured at 90 cents on the dollar. Plaintiff did not inform Mr. Hudson that he had any claim against the defendants to recover the $10,000, and he knew nothing of such claim. Acting under the advice of his attorney, plaintiff intended to bring suit on the present cause of action against Burnham, Stoepel & Co. and A. Krolik & Co. as soon as the settlement was made, and not to disclose such intention; and the important question is, Did the circumstances require him to disclose such intention? Plaintiff and his wife repeatedly testified that the understanding with Corwin and Fixel was—

"That all drafts and all moneys that come back through the insurance policies would have to be deposited in the Old Detroit National Bank in Hugh Dillon's name *for the benefit of his creditors.*"

Plaintiff further testified that he signed a paper to that effect.

"I didn't read it myself. I signed one that money was to be all deposited in the Old Detroit National Bank *for the benefit of my creditors.*"

Plaintiff's wife testified that she and plaintiff attended one meeting of creditors at the Old Detroit National Bank, and it is inferable from her testimony that the amounts derived from and paid out of the insurance fund were con-

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sidered, and that she and her husband said nothing of their claim. It is further apparent that plaintiff must have known that the creditors were acquainted with the state of that account, and were treating the $10,000 as properly paid out of moneys deposited for their benefit, and which otherwise would have come to them. Their excuse for not enlightening their creditors at the bank meeting was:

"We were acting under our attorney's advice. We knew we were to make a claim; we kept our mouths shut and asked for further time, and subsequently accepted terms at 90 cents on the dollar."

We think the circumstances called upon the plaintiff to open his mouth and acquaint the creditors with his claim, and, not having done so, we agree with the circuit judge that he is now estopped to prosecute such claim against defendants Burnham, Stoepel & Co. and A. Krolik & Co., and a verdict was properly directed in their favor.

As to defendant Fixel, the case is different. The verdict having been directed, we must give to plaintiff's proofs the utmost probative force of which they are reasonably capable. So considered, the proofs tended to show that Fixel, having the confidence of plaintiff, induced him to transfer the collection of his insurance from Van Antwerp, with whom he had arranged, to Craig, Wright & Walker, and to turn over the whole conduct of his affairs to Fixel and Corwin; that, knowing that plaintiff had made no agreement whatever with Craig, Wright & Walker as to their compensation, and in contravention of the agreement as to the deposit of the collections, Fixel, without the knowledge or consent of plaintiff, paid over to or authorized Craig, Wright & Walker to take $10,000, which he knew to be a grossly excessive sum for such compensation.

Mrs. Dillon testified:

"Mr. Fixel brought me up this memorandum, and told me he had deposited that much money in the bank—$9,151.50. The statement from the Old Detroit National

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Bank that I produced here shows a credit on that date of that amount. Fixel says: 'Now, we can write out some checks.' And I said: 'Mr. Fixel, there was more drafts than that come back, and Mr. Dillon said he signed a whole lot of drafts.' And he said: 'Well, I give Craig, Wright & Walker $10,000.' And I said: 'My God, did you give our money away? I thought we agreed you were to put all the money in the Old Detroit National Bank for the benefit of our creditors, and that Mr. Dillon was to sign those checks?' He said, 'Well, I give them their money,' and he sneered at me in his way, and walked out of the office and down the stairs and outside. The amount of the policies that had been paid on that day was $19,151.50; the amount of the deposit, as appears by that slip is $9,151.50."

Mr. Dillon testified:

"On the 6th of February, about that time, Mr. Fixel told me straight, 'Don't go near no attorney;' and he says: 'You take my advice; just keep my instructions, and leave it to us; don't go near any attorney.' * * * I let them go ahead and do as they saw fit. * * * After the inventory was taken and after the checks began coming back, or the drafts, whichever they were, Mr. Fixel came over to our house and wanted us to turn over our lease. The following day he came up to the second floor of the store, and he wanted Mrs. Dillon to write out a check for their company (A. Krolik & Co.) and for Burnham, Stoepel & Co., and she says, 'I am busy now.' And he says: 'Well, I am busy, too; I want you to write out two checks.' And he says: 'You have money now; there is money in the fund, and I want those two checks.' And so she says: 'Well,' she says, 'to tell you the truth, Mr. Fixel, I won't write any more checks without the consent of my attorney.' And so he says: 'Your attorney! Have you an attorney?' And she says, 'Yes, I have.' 'Well, he says—he shoved his fist to her nose—'I will tell you right now, woman, I will leave you without a dollar, and,' he says, 'I will take the rings from your fingers, and leave you without a dollar if you take an attorney into this case. And what attorney did you get?' And she says, 'Mr. Sloman.' And I says: 'Mr. Fixel, look here. You have robbed us long enough, and I took you for a friend. You acted as a friend to me all

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along,' I says. 'I took you for a friend, and, instead of that,' I says, 'you gave $10,000 of my money away, and my goods is gone, and I have done everything to please you because I depended upon you. Now I have nothing to pay 100 cents on the dollar with, which I wanted to do, and which I intended to do right along,' I says. 'It will be different now. We will do as our attorney tells us from this on.'"

It is apparent, therefore, that, before the settlement, Fixel knew that plaintiff was not acquiescing in his turning the $10,000 over to Craig, Wright & Walker, but, on the contrary, was characterizing such act as robbery. The fact that plaintiff, in accordance with the written agreement, indorsed other drafts and checks over to Craig, Wright & Walker, after knowledge of the wrongful payment, no more affirmed its legality as to Fixel than as to Craig, Wright & Walker. Plaintiff complained to Fixel himself; he was under no obligation to him to complain to any one else. Plaintiff owed no duty to Fixel as an individual wrongdoer; he had full knowledge of all the facts; and we find no basis for an estoppel as to him.

The judgment is affirmed as to defendants Burnham, Stoepel & Co. and A. Krolik & Co., and reversed and a new trial ordered as to defendant Adolphus Fixel. Defendants Burnham, Stoepel & Co. and A. Krolik & Co. will recover costs against plaintiff, and plaintiff will recover costs against defendant Fixel.

OSTRANDER, C. J., and BIRD, STEERE, MOORE, MCALVAY, BROOKE, and STONE, JJ., concurred.

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PEOPLE v. OBLASER.

1. CRIMINAL LAW—JURY—QUALIFICATIONS—TRIAL—PRELIMINARY EXAMINATION.
   That counsel for respondent, who was accused of murder, was not permitted to examine a juror as to the state of his health, was not error, in the absence of a showing that his health or physical condition affected his verdict, which was rendered after a short trial.

2. SAME—CONSTITUTIONAL LAW—TRIAL—SEPARATION OF JURY.
   Act No. 4, Pub. Acts 1909, authorizing the court to permit the jury in criminal trials to separate, is constitutional as an amendment to 3 Comp. Laws, § 11960, the title of which refers only to murder cases: for the court had such power in other criminal causes prior to the amendment, which therefore only affects prosecutions for murder, and is within the title of the original act.

3. SAME—TRIAL—ARGUMENT—PROSECUTING ATTORNEY.
   Argument of the prosecuting attorney that did not clearly distinguish between facts, and inferences which he drew from them, was not prejudicial error on the trial, which resulted in a just verdict.

Error to Wayne; Mandell, J. Submitted January 20, 1911. (Docket No. 195.) Decided November 3, 1911. Rehearing denied March 30, 1912.

August Oblaser was convicted of murder in the second degree. Affirmed.

Philip A. McHugh and *William Henry Gallagher*, for appellant.

Philip T. Van Zile, Prosecuting Attorney, and *Fred H. Aldrich*, Assistant Prosecuting Attorney, for the people.

OSTRANDER, C. J. The defendant, having been convicted of murder, has appealed to this court. Upon the

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trial, a motion to quash the proceedings was made on grounds which, in our judgment, were covered in the cases of *Oblaser* v. *Wayne Circuit Judge*, 159 Mich. 665 (124 N. W. 590), and a mandamus case in the same cause, decided later, which is not reported.

Complaint is made that counsel were not allowed to examine a juror upon the condition of his health and his physical ability to sit during a long trial. Inasmuch as the trial was short, and the juror sat through it without apparent injury to his health, and as it does not appear that his health or his physical condition affected his verdict, we may dismiss that question.

Error is assigned upon the omission of the trial judge to order that the jury be placed in charge of an officer during the trial. Section 11960, 3 Comp. Laws, required the confinement of jurors in murder cases. It was passed under the following title:

"An act to provide for the placing of juries, while engaged in the trial of cases of murder, under the charge of a competent officer duly sworn as prescribed in this act, and to define the duties of certain officers in relation thereto, and to provide a penalty for any wilful violation thereof."

Act No. 4, Pub. Acts 1909, was entitled "An act to amend section one of act number," etc., "being section eleven thousand nine hundred sixty of the Compiled Laws of eighteen hundred ninety-seven." Section 11960 was by said act amended as follows:

"The jurors sworn to try a criminal action in any court of record in this State, may, at any time before the cause is submitted to the jury, in the discretion of the court, be permitted to separate or be kept in charge of proper officers."

The remainder is immaterial to the question. It is claimed that this act is unconstitutional, for the reason that the title to the original act was limited to murder cases. The title of the original act does limit amendments made under the title to the amendatory act, but under the amendment the provision quoted, had it been applied to

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murder cases only, would not have been invalid; and, inasmuch as courts had, at the time of the passage of this act, full power to confine or permit jurors in other cases to separate, and this was not changed by the provision, the act can be held good as to murder cases. There is therefore no necessity or reason for reversing the cause upon this point.

Fifty-four requests to charge were presented. Many of them are statements of elementary principles; some are quotations from opinions of this court in other cases, and as a whole they are in a way argumentative. Some were given, and others were covered by the charge. We have gone carefully over these requests and the charge, and think that defendant has no cause to complain.

The language of counsel complained of consisted of arguments addressed to the jury, which called attention to testimony and certain inferences which they were asked to draw therefrom. It is claimed that testimony was misrepresented. We do not discover any misrepresentations. The prosecuting attorney did not always in terms make a clear distinction between the facts sworn to by witnesses and the inferences which he drew from them. But the jury heard the testimony as well as the argument, and it is assumed that they supplied what the attorney sometimes omitted. We have given very careful consideration to this subject, and, while we cannot approve of all that was said in argument, are convinced that, in view of the testimony, the jury could have honestly returned no other verdict than the one which was returned.

There was no error in denying a new trial, and we think the verdict a just one. Some questions are raised over rulings in the admission of testimony. As no new trial will be necessary, we do not say more about them than that we find no error.

The judgment is affirmed.

BIRD, MOORE, MCALVAY, and BROOKE, JJ., concurred.

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MICHIGAN RAILROAD COMMISSION *v.* MICHIGAN CENTRAL RAILROAD CO.

1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — MICHIGAN RAILROAD COMMISSION—INTERCHANGE OF CARS.

An order of the Michigan railroad commission requiring the Michigan Central Railroad, a steam road, and the Detroit United Railway, an electric railway, to install a connecting track between the two roads in the village of Oxford, Michigan, and to interchange freight cars and passenger traffic, is not in violation of the commerce clause of the Federal Constitution (Art. 1, sec. 8, subd. 3), since the order must be deemed to affect only intrastate traffic, which is within the jurisdiction of the commission. (Act No. 312, Pub. Acts 1907; Act No. 300, Pub. Acts 1909.)

2. SAME—DUE PROCESS OF LAW.

Said act creating the commission and authorizing it to act in such cases does not deprive respondent of its property without due process of law; subdivision c of section 7 containing a provision for reasonable compensation to the carrier.

3. SAME—EQUITY JURISDICTION—MANDAMUS.

The questions of the practicability of the physical connection and interchange of traffic and of the reasonableness of the service being reviewable only by proceedings in chancery under section 26, Act No. 312, Pub. Acts 1907, are not open for determination in mandamus to compel the carrier to conform to the order of the Michigan railroad commission.

Mandamus by the Michigan railroad commission against the Michigan Central Railroad Company to compel the interchange of traffic between respondent and the Detroit United Railway, under an order of the commission. Submitted April 20, 1911. (Calendar No. 24,103.) Writ granted November 3, 1911. Rehearing denied March 30, 1912.

Franz C. Kuhn, Attorney General, and *George S. Law*, Assistant Attorney General, for relator.

Frank E. Robson (*Henry Russel*, of counsel), for respondent.

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BLAIR, J. Relator asks for a writ of mandamus to compel respondent to comply with its order—

"For the reasons set forth more fully in the opinion of the commission this day filed, that the said Michigan Central Railroad Company and the said Detroit United Railway Company, on or before the 15th day of August, A. D. 1908, connect their tracks at such point in the said village of Oxford, Oakland county, as they shall between themselves agree upon as most desirable, and thereafter there interchange cars, car load shipments, less than car load shipments and passenger traffic in accordance with the provisions of section 7 of Act 312 of the Public Acts of 1907.

"It is further ordered that the said defendants shall, on or before the 1st day of July, A. D. 1908, designate the point at which such physical connection shall be made and notify the said commission of such designation, and that if the said defendants are unable to agree as to the said point then the said commission shall, on or after the said 1st day of July, make a supplemental order herein, determining the location of said connection."

The Michigan Central Railroad Company operates the Detroit & Bay City Railroad as lessee. The line of the Detroit & Bay City Railroad extends from the city of Detroit, in the county of Wayne, to the city of Bay City, in the county of Bay, passing through the village of Oxford, in the county of Oakland. The Detroit United Railway Company, a corporation organized and existing under the street railway act (chapter 168, 2 Comp. Laws), operates an interurban railway extending from the city of Detroit to the city of Flint, and likewise passing through the village of Oxford, in the county of Oakland. Between the village of Oxford and the city of Flint, the railroad of the Detroit United Railway passes through the village of Ortonville, in the county of Oakland, and the villages of Goodrich and Atlas, in the county of Genesee. Ortonville is 10 miles from Oxford; Goodrich is 16 miles from Oxford; and Atlas is 18 miles from Oxford. The only railroad facilities at Ortonville, Goodrich, and Atlas are such as are afforded by the Detroit United Railway.

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The Detroit United Railway is operated entirely by electric motive power, while the Michigan Central Railroad is operated by steam power. Shipments of freight to or from points on the Detroit United Railway between Oxford and Flint are required to be transferred from the steam railroad cars of the Michigan Central to the cars of the Detroit United Railway, and transported by the Detroit United Railway to their destination.

In January, 1908, certain residents of Ortonville and also of Goodrich filed with the Michigan railroad commission a complaint against the Michigan Central Railroad Company and the Detroit United Railway Company, asking in substance that an order be made by the commission requiring the Michigan Central Railroad Company and the Detroit United Railway Company to make a physical connection of their railroad tracks in the village of Oxford, and to there interchange cars, car load shipments, etc., in accordance with the provisions of subdivision "*b*" of section 7, Act No. 312, Pub. Acts 1907. April 28, 1908, a hearing was had before the commission, after due notice to the railroad companies, at which the railroad companies appeared and were represented by counsel, and a full hearing had bearing upon the matters complained of in said petitions. On June 5, 1908, the commission filed an opinion in said cause, and upon the same day made the order above referred to. The companies not having designated the point at which the physical connection of their tracks was to be made, the commission, on the 27th of November, 1908, made a supplemental order designating the point at which such physical connection should be made, and extending the time for the installation of the same to December 11, 1908. The physical connection between the tracks of said railroad companies was thereafter installed as ordered by said commission, and is still maintained by said railroad companies, although respondent performed its part under protest.

The orders made by the Michigan railroad commission were duly served upon the Michigan Central Railroad

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Company and the Detroit United Railway Company, as required by law, and neither of said companies instituted any proceeding to test the validity of said orders within the time limited therefor by section 26, Act No. 312, Pub. Acts 1907. The Detroit United Railway Company is willing and able to accept cars and car loads of freight from the Michigan Central Railroad Company to be delivered along the line of the Detroit United Railway between the village of Oxford and the city of Flint. The Michigan Central Railroad Company, however, has hitherto refused, and still refuses, to deliver cars and car loads of freight to the Detroit United Railway Company for transportation to the points on the Detroit United Railway between Oxford and Flint.

The original act creating the Michigan railroad commission is Act No. 312, Pub. Acts 1907, entitled:

"An act to regulate railroads and the transportation of persons and property in this State, prevent the imposition of unreasonable rates, prevent unjust discrimination, insure adequate service, create the Michigan railroad commission, define the powers and duties thereof, and to prescribe penalties for violations hereof."

Subdivision "*d*" of section 3 of said act provides that "the term 'railroad' as used in this act shall be construed to include both steam and electric railroads," etc. Subdivision "*b*" of section 7 of said act, under which the orders in this case were made, provides as follows:

"Where it is practicable and the same may be accomplished without endangering the equipment, tracks, or appliances of either party, the commission may, upon application, require steam railroads and interurban and suburban railroads to interchange cars, car load shipments, less than car load shipments, and passenger traffic, and for that purpose may require the construction of physical connections upon such terms as it may determine: *Provided*, that nothing in this act shall be construed to require through billing of freight as between steam and electric, suburban or interurban railroads, but such suburban and interurban railroads may be used for the handling of freight in car load lots in steam railroad freight

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cars between shippers or consignees and the steam railroads, in the same manner and under the same general conditions, except as to motive power, as belt line railroads and terminal railroads are now or may hereafter be used for like purposes."

Subdivision "*c*" of the same section provides:

"Every corporation owning a railroad in use shall, at reasonable times and for a reasonable compensation, draw over the same the merchandise and cars of any other corporation or individual having connecting tracks: *Provided*, such cars are of the proper gauge, are in good running order and equipped as required by law and otherwise safe for transportation and properly loaded; *provided further*, if the corporations cannot agree upon the times at which the cars shall be drawn, or the compensation to be paid, the said commission shall, upon petition of either party and notice to the other, after hearing the parties interested, determine the rate of compensation and fix such other periods, having reference to the convenience and interests of the corporation or corporations, and the public to be accommodated thereby, and the award of the commission shall be binding upon the respective corporations interested therein until the same shall have been revised. Any railroad corporation refusing to comply with the provisions of this section shall be liable to a penalty not exceeding five hundred dollars."

Sections 25 and 26 read as follows:

"SEC. 25. All rates, fares, charges, classifications and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be *prima facie* lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section twenty-six of this act, or until changed or modified by the commission as provided for in paragraph (*b*), section twenty-four of this act.

"SEC. 26. (*a*) Any railroad or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices or services, may within sixty days commence an action in the circuit court in chancery against the commission as defendant to vacate and set aside any such order on the

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ground that the rate or rates, fares, charges, classifications, joint rate or rates fixed is unlawful or unreasonable, or that any such regulation, practice or service fixed in such order is unreasonable; in which suit the commission shall be served with a subpœna. The commission shall file its answer, and on leave of court any interested party may file an answer to said complaint, whereupon said action shall be at issue and stand ready for hearing upon ten days' notice by either party. All suits brought under this section shall have precedence over any civil cause of a different nature pending in such court, and the circuit court shall always be deemed open for the hearing thereof, and the same shall proceed, be tried and determined as other chancery suits. Any party to such suit may introduce original evidence in addition to the transcript of evidence offered to said commission, and the circuit courts in chancery are hereby given jurisdiction of such suits and empowered to affirm, vacate or set aside the order of the commission in whole or in part, and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law."

Respondent claims a mandamus should not issue because:

"(1) The Detroit United Railway Company is a 'street railway,' and not authorized by the act under which it is organized to do a 'railroad' business and transport over its lines freight and freight cars of the character transported by respondent, and it cannot be authorized so to do by the municipalities through which its lines pass, nor by the action of relator.

"(2) And therefore it is not competent to enter into any contract, agreement, or arrangement for that purpose with respondent.

"(3) Nor is it, in fact, possessed of cars, equipment, tracks, or other facilities sufficient to handle such freight and freight cars, or with which to make the interchange of business required by the order of relator.

"(4) Respondent cannot without breach of contract interchange with the Detroit United Railway Company cars in its possession belonging to foreign or other corporations.

"(5) The order of said commission and the statutes purporting to authorize it violate section 16, art. 2, of the Constitution of the State of Michigan (and as well section 32 of article 6 of the Constitution of 1850), and the four-

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teenth amendment to the Constitution of the United States, in that the enforcement of said order and statutes would deprive respondent of its property without due process of law.

"(6) Said order and said statutes are an attempt to regulate and impose a burden upon interstate commerce, and violate section 8 of article 1 of the Federal Constitution, vesting in Congress the power to regulate interstate commerce."

The opinion of the commission, after determining the practicability of the physical connection and of interchange, and reciting the testimony and other facts, proceeds as follows:

"**Reasonableness of Requiring Interchange.** The evidence in this case amply sustains the allegations of complainants in these cases that interchange between the electric and steam lines at the points in question would result in very substantial benefits to these villages and the surrounding communities. It is shown that 50 cents less per ton is paid for hay at Ortonville than at the neighboring town of Grand Blanc. Fifty cents more is charged per ton for coal at Ortonville than at Oxford, and these differences in price are due to the expense incurred in the transfer at Oxford of said commodities from the cars of the steam line to those of the electric. Stock for shipment must be driven to Thomas, Davison, and other points. Elevator facilities have not been provided at Goodrich or Ortonville because of lack of shipping facilities. As to defendant Michigan Central Railroad Company, small sacrifice is asked in order to secure to these people the benefits they ask. It will have to expend its proportion of the amount necessary to install the connection, but no further expenditure is involved for it. Were the contemplated elevator at Goodrich one to be established at Oxford on the line of the Michigan Central, or at Flint on the 'cut-off' of the Grand Trunk, side track facilities would be provided for it by that company, in view of the business to be derived. The business to be derived by the steam railroad company from Ortonville, Goodrich and surrounding country, via these connections and the Detroit United Railway, gives promise of being considerable in amount. Thereby it is believed the Michigan Central Railroad Company and the Grand Trunk Western Rail-

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way Company will be the beneficiaries by such connections."

It is apparent that the statute expressly authorized the order made, and, the respondent having failed to institute proceedings for a review of the order, the questions of the practicability of the physical connection and of the interchange of traffic, as well as the reasonableness of the service required, are not open in this proceeding. We therefore consider only the constitutional questions presented.

Does the order violate the commerce clause of the Constitution? As we have heretofore held, the jurisdiction of the commission is limited to intrastate traffic, and its order in the present case must be deemed to be so limited. *Ann Arbor R. Co.* v. *Railroad Commission*, 163 Mich. 49 (127 N. W. 746). See, also, *Wisconsin, etc., R. Co.* v. *Jacobson*, 179 U. S. 287 (21 Sup. Ct. 115); *Pittsburg, etc., R. Co.* v. *Railroad Commission*, 171 Ind. 189 (86 N. E. 328).

Does the order deprive respondent of its property without due process of law? For the affirmance of the proposition that it does, respondent relies upon *Central Stock Yards Co.* v. *Railway Co.*, 192 U. S. 568 (24 Sup. Ct. 339), and *Louisville, etc., R. Co.* v. *Stock Yards Co.*, 212 U. S. 132 (29 Sup. Ct. 246). In our opinion, the present case is distinguishable from, and not ruled by, the cases cited, for the reasons that the statute expressly imposes upon respondent an obligation to interchange cars, etc., and subdivision "*c*" of section 7 above quoted expressly provides for reasonable compensation.

We therefore hold the statute to be constitutional, and the writ will issue as prayed.

STEERE, MOORE, MCALVAY, BROOKE, and STONE, JJ., concurred with BLAIR, J.

OSTRANDER, C. J. I am of opinion that the act in question may be so construed that it will be constitu-

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tional. In so far as he considers the grounds upon which the validity of the law is attacked, I agree with Mr. Justice BLAIR. While I doubt the propriety of declaring the law to be constitutional before, and apart from, determining the meaning of some of its provisions, I am willing to assent to the granting of an order requiring respondent to conform to the order made by the commission.

BIRD, J., did not sit.

WHITE *v.* UNITED STATES GYPSUM CO.

1. APPEAL AND ERROR—FINDINGS OF FACT—TRIAL.
   On review of a judgment entered after a trial by the court without a jury, where no written request for findings is filed, and findings in writing have been made, they will be presumed to have been made upon request and have the same effect as if requested.
2. SAME—VERDICT.
   As every finding is one and entire and stands in lieu of a special verdict, the appellate court should accept everything evidently intended as facts found wherever set forth; it will not invalidate the findings that those of fact have not been separated from the conclusions of law.
3. SAME—CONTRACTS.
   Findings of fact determining that no contract of hiring was executed between plaintiff and defendant are sustained as being supported by evidence.
4. CONTRACTS—IMPLIED CONTRACTS—PRESUMPTIONS.
   When negotiations for a contract are pending, the law will not imply a contract upon which the minds of the parties have not met.
5. SAME—MASTER AND SERVANT.
   The rendition of services of a different character from those which had been previously rendered by an employé, whose contract had expired, afford no presumption that his former contract is renewed.

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6. SAME.

Where plaintiff was engaged by defendant under a three-year contract of hiring, which the parties later canceled by consent, and plaintiff was re-engaged at a stated salary for the remainder of the year, except two months, and where plaintiff, before the expiration of the year, attempted to renew his employment, rendering services of a different character while negotiations pended, a contract of hiring, express or implied, for the following year was not proved.

Error to Kent; Perkins, J. Submitted November 14, 1911. (Docket No. 117.) Decided December 8, 1911. Rehearing Denied March 30, 1912.

Assumpsit by David R. White against the United States Gypsum Company for breach of a contract of employment. Judgment for defendant. Plaintiff brings error. Affirmed.

Pleasant J. Phillips, for appellant.

Scott, Bancroft & Stephens and *Butterfield & Keeney*, for appellee.

STEERE, J. This is an action to recover damages for breach of an alleged contract of employment.

Plaintiff sought to recover salary and expenses, as traveling salesman for defendant company under an implied renewal of a pre-existing express contract, which expired on Decembr 31, 1909. The business of the defendant company was the manufacture and sale of Cementico and wall-coating goods of similar nature. Plaintiff's claim was for the amount of his salary and expenses for the year 1910, on the basis of the preceding contract, less what plaintiff earned in other employment, and less an emergency expense fund of $150, which defendant had kept good in plaintiff's hands under the previous contract, and which he retained. The court found for defendant, and gave judgment, under defendant's notice of set-off, for the $150 emergency fund, less $13.34, the value of two days' work performed by plaintiff in January, 1910. The

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declaration was framed upon a special contract of hiring, with the common counts added. Defendant pleaded the general issue with notice of set-off. This case was tried before the court without a jury.

There is very little conflict of testimony. It is mostly documentary, consisting of 62 exhibits, for the most part letters, the testimony of the plaintiff and two officials of defendant. The testimony of the three witnesses sworn is more at variance in their conclusions than upon the facts in relation to which they testify. The court filed certain findings in the case. When requested in writing, the judge is required to specify the facts found, and his conclusions of law thereon. The record fails to disclose any written request therefor, but, findings having been filed, they will be presumed to have been made upon request, and have the same effect as if requested. Under Circuit Court Rule 26, plaintiff proposed extensive amendments and additions to the findings filed by the court, which were reviewed by the court, and denied. Motion was then made by plaintiff's counsel for a new trial, which was argued and denied, and the case is here for review.

The only questions which can be considered by the appellate court are whether there is any evidence to support the facts found, and whether the facts found support the conclusions of law upon which the judgment is based. The substance of the alleged errors which plaintiff urges for consideration are: That the findings of fact are unsupported by the evidence; that the court in his findings embodies a recital of claims and evidence, instead of findings of fact; that the court's conclusions of law, "if any may be so construed," are contrary to, and unsupported by, evidence; that the court failed to find any conclusions of law, and refused to adopt the several findings of fact requested by plaintiff.

The findings made by the court are entitled "Findings of Fact;" no portion being set apart or designated as conclusions of law. No. 1 of such findings is a recital of the claims and allegations of the respective parties, their

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pleadings and notices. The remainder of the findings are as follows:

No. 2: "It appears that the arrangement made, under which plaintiff traveled for defendant during the month of January and the early part of February of the year 1909, was preliminary in its nature, and that by the terms of such arrangement it was left entirely indefinite between the parties as to whether any arrangement should be made for the future, and what the nature of that arrangement should be. I find as a fact that a contract to employ plaintiff as a traveling salesman was made and consummated in writing between the parties to this cause upon February 9, 1909, and that by the terms of such contract defendant did employ plaintiff, and plaintiff agreed to serve defendant as a traveling salesman for the balance of the year 1909, and until December 31st of that year. Said contract provided that plaintiff should receive $200 per month as his salary and his actual expenses while acting as a salesman. I further find that all the negotiations, matters, and things which took place prior to the consummation of such contract were preliminary thereto, and are not a part thereof, and that no contract of employment was made for a term of one year, or from January 1, 1910, to December 31, 1909 (1910)."

No. 3: "I find as a fact that said contract has been fully performed by both parties thereto."

No. 4: "It is claimed by the plaintiff that the letter referred to in the declaration written by him upon December 2, 1909, to the defendant company, contains an offer to serve the defendant as traveling salesman, and that the defendant accepted such alleged offer in and by a letter written by a Mr. George H. Booth, also in the employ of the defendant company, upon December 30, 1909, requesting the plaintiff to examine and correct certain advertising matter. It appears that plaintiff's letter of December 2d was referred to Mr. Servitus Q. Fulton, the manager of the sales department of the defendant company, and that the plaintiff was advised of such fact by two letters from said Booth, dated December 4 and 14, 1909, respectively, and that the plaintiff, by two letters written upon December 12th and 27th, respectively, requested a reply to his said letter of December 2d. It also appears that no reply was received by plaintiff from Mr. Fulton until he was shown a letter from the latter to said Booth

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upon January 26, 1910. It appears that plaintiff went to Chicago on the latter date at his own expense. It also appears that Mr. Fulton and the president of defendant company were the only persons having authority to employ salesmen. It does not appear that Mr. Booth had any such authority, either express or implied, but, on the contrary, it appears that Mr. Booth had no such authority. I find as a fact that negotiations were pending between the parties looking to a contract for the employment of plaintiff at the time of the expiration of the contract of February 9, 1909, but that such negotiations did not result in any agreement between the parties. I further find as a fact that no contract, express or implied, was made or entered into by defendant, or by any one authorized to act for it, to employ plaintiff for the year 1910."

No. 5: "I find that plaintiff performed certain services for defendant upon the 1st and 14th days of January, 1910, and that the services as performed were not within the regular scope of the duties of a traveling salesman. It does not appear what the value of these services was, unless such services can be determined by reference to the contract existing between the parties prior to January 1, 1910. By reference to such contract, I find that the reasonable value of such services was $6.67 per day, and that he is entitled to the sum of $13.34 for such services."

No. 6: "It is admitted that the sum of $150 was advanced by defendant to plaintiff, and that said sum has never been repaid. I find that there is due from plaintiff to defendant said sum of one hundred and fifty ($150) dollars, less the reasonable value of service performed, viz., less the sum of $13.34."

It has been held that, as every finding is one and entire, and stands in lieu of a special verdict, this court should accept everything evidently intended as facts found, no matter in what part it may be set forth. While it might be more easily understood and orderly to separate the facts from the conclusions of law, that such has not been done will not invalidate the findings. It therefore becomes incumbent upon this court to inquire if these findings anywhere within them contain a statement of facts, supported by the testimony, followed by correct conclusions of law, to sustain the judgment.

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No. 1 of the court's finding of facts, being merely a recital of what he regarded as the essential elements of the pleadings, is perhaps of little importance, as the pleadings would be part of the record in any event, but are unobjectionable as an introductory statement.

In support of the court's findings 2 and 3, there is ample evidence tending to show that plaintiff was employed as a traveling salesman by defendant, under contracts of hiring covering a period from September 1, 1908, to December 31, 1909. There had been three previous contracts between the parties. The first commenced September 1, 1908, to continue three years, on a commission basis. On January 9, 1909, with the understanding that the three-year contract should "remain stationary for the time being," a verbal contract was made between plaintiff and a representative of the company, named Bartlet, that plaintiff should perform some special service in the Northwest. It was understood that this service would require a month's time, for which plaintiff was to receive a salary of $225 and his expenses. This contract was fully performed by both parties. Pursuant to previous correspondence, the defendant, on February 8, 1909 (the date of the completion of the one-month's contract), wrote to plaintiff, offering him $200 per month and expenses for the remainder of the year 1909, on condition that he at once surrender and cancel the three-year contract on commission basis. This offer was accepted by letter, dated February 9, 1909, being in part as follows:

"Yours of the 8th is received and in reply will accept the salary of $200 per month with expenses for the balance of 1909, excepting the months of June and July. Will send the canceled contract to you as soon as I can get same from home."

This contract on a salary basis, commencing February 9, 1909, and ending December 31st of the same year, was fully performed by both parties.

In support of findings 4 and 5, there is testimony tend-

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ing to show that on the 2d of December, 1909, plaintiff wrote defendant:

"As our agreement ends with the present month, the writer wishes to know at your earliest convenience if you desire me to remain with you for the coming year."

Two days later the company replied that his letter had been preserved for the attention of Mr. Servitus Q. Fulton, manager of the sales department. On December 14th, in reply to plaintiff's further request on the subject, he was informed that Mr. Fulton had just returned from an extended trip, and had not yet "worked down to his matter." On December 30, 1909, defendant company wrote plaintiff that they would soon need another supply of package wrappers, and asked his advice concerning printed matter for same; also asked him to draw up more explicit instructions in regard to the treatment of walls and the application of their wall-coating material, adding this observation:

"You have written the writer [Booth] previously that you would be glad of an opportunity of this nature, and it occurred to me that nothing would give you more pleasure on New Year's day than to ruminate over one of our wrappers."

Plaintiff next day forwarded the company the information requested, which was acknowledged on the 4th. As to what took place in January, 1910, before plaintiff learned he was not to be re-employed, plaintiff testified as follows:

"After December 31, 1909, I performed services for the company. I received instructions in a letter dated December 27 or 29, 1909, and I drafted this matter and sent it to the company. I looked over copies sent in letter of January 13, 1910, corrected and sent them back. * * * I made no trips under instructions from the company in January, 1910. On the 24th or 25th of January, I went to the company's office in Chicago to see what was the reason I was not sent out on the road."

Plaintiff further testifies that he saw a boy hand to Mr.

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Booth (the correspondence head of paint department of the company) a letter, which Mr. Booth read, and immediately handed to him. It ran as follows:

"Jan. 24, 1910.

"Gypsum Arts Dept.
"Mr. GEORGE H. BOOTH,
"Office.

"*Dear Sir:* Referring to the attached, long past due, will say we have concluded not to employ Mr. White during the next year, but will sell only such material as we can market through our office effort.

"Yours very truly,
"S. Q. FULTON,
"Gen. Sales Manager."

There is also testimony tending to show that on December 27, 1910, plaintiff wrote defendant, stating that he had as yet received no reply to his letter of December 2d; that from December 2d to the close of the year he was engaged in his regular work, and corresponding with defendant in relation to same; the letters received by him from defendant being written by George H. Booth, and marked with the initials "G. H. B.," being the same party who had previously advised plaintiff that his proposal of December 2d had been referred to and awaited the action of Mr. Fulton. In the early part of January, 1910, a few letters were written by plaintiff to defendant, and four letters received by him from defendant, three from Booth, and one from the accounting department, none of them referring to or purporting to answer his inquiry of December 2d; on January 1, 1910, plaintiff signed a receipt, showing that the $150 emergency expense fund was yet in his hands and owing to defendant. There was direct testimony, introduced by defendant, tending to show that Booth was only the general correspondent of the paint department, and had no authority to employ traveling salesmen, of which fact plaintiff had knowledge. We think there is evidence in this case tending to support all the material facts found by the trial judge.

Are his conclusions of law sound?

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After February 9, 1909, plaintiff was in the employ of defendant under a written contract for the remainder of the year, except June and July, on a salary of $200 per month and expenses. His two previous contracts had been performed or canceled by mutual agreement, and were entirely out of the way. This contract expired December 31st, and plaintiff opened negotiations for a rehiring. He was advised who had authority to hire, and to whom his proposition was referred. At the time his contract expired, negotiations which he had initiated were pending between the parties. When negotiations for a contract are pending, the law will not conclude them by any presumptions of an implied contract. *Van Valkenburg* v. *Rogers*, 18 Mich. 180.

Plaintiff made no trips as a traveling salesman, under instructions of the company, after January 1, 1910, and the court has found as a fact that certain services performed by him for defendant on January 1st and 14th were not within the regular scope of his duties as a traveling salesman. Where an employé, after his term of hiring expires, renders service of a different character for his former employer, it raises no presumption that his former contract is renewed. *O'Connor* v. *Briggs*, 182 Mass. 387 (65 N. E. 836).

It appears to be plaintiff's contention that the original contract of hiring for a term of three years on a commission basis, which was suspended for a month in January and February, 1909, and at the conclusion of that month canceled by mutual agreement, followed by the hiring of February 9, 1909, for the balance of the year, still had some force and vitality, which affected the last contract, so that it assumed the nature of a hiring for a year, although in fact it began February 9th and continued until December 31st, "excepting the months of June and July." During the progress of the trial, counsel stated his position as follows:

"The fact of employment in January of 1909, and the

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renewal of that engagement in February, under the circumstances of the three-year employment on a commission basis, I claim does create a contract for a year, then and there, that it is to be renewed over, and yet I say, if this is not the condition, the letter sent to the company by Mr. White on December 2d would also imply a new contract for 1910. I consider both form the same proposition—the employment of White for the year 1910, upon the same terms as he had in 1909."

Substantially the same proposition is set out in plaintiff's request for additional findings.

We cannot conclude that a one-year contract is to be inferred from a three-year contract, or that a former contract, entirely ended by performance or cancellation, can have any bearing on a subsequent and distinct contract, which is in writing and unequivocal in terms. The last contract was not for a year, but 10 months and 20 days duration, with two intervening months excepted, making an actual employment of between 8 and 9 months. If we should construe the relations of the past as impliedly renewing this contract for the year 1910, it would begin on February 9th and run to December 31st, and what services plaintiff rendered after his former contract expired were in January, 1910, before his new contract would begin, if it was implied to be the same as the former one. Plaintiff seems to have thus regarded it himself, for in his bill of particulars is a distinct item for that month, as follows: "Salary earned under contract during the month of January, 1910, $225." He appears to be claiming this contract for a year and for less than a year at the same time. The court correctly found from the written testimony that plaintiff's contract was made on February 9, 1909, and expired December 31, 1909. No new contract for a year's hiring could be implied from the same, even though plaintiff continued regularly in the employ of defendant into the ensuing year. When it is not shown that the original contract is for an entire year, and that the service rendered under it continued at least a year, no presumption of renewal for another year on the same terms

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arises by reason of continuance in the same service. *Ewing* v. *Janson*, 57 Ark. 237 (21 S. W. 430); *Caldwell* v. *Caldwell Co.*, 88 N. Y. Supp. 970; *Barnes* v. *Manufacturing Co.*, 113 N. Y. Supp. 977.

We conclude that the facts found by the trial court were supported by competent testimony, and his conclusions of law thereon are without error.

The judgment is affirmed.

OSTRANDER, C. J., and MCALVAY, BLAIR, and STONE, JJ., concurred.

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JANUARY TERM, 1912.

ATTORNEY GENERAL, *ex rel.* VERNOR, *v.* COMMON COUNCIL OF THE CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—CHARTER—AMENDMENT—ELECTIONS.
   Amendments to the charter of a city must be submitted to the vote of the electors at the next election after the proposed amendment has been adopted by the municipal council, whether the election is general or special. Act No. 279, Pub. Acts 1909; Act No. 203, Pub. Acts 1911.

2. SAME — CONSTITUTIONAL LAW — CITIES — LOCAL SELF-GOVERNMENT—MUNICIPAL CORPORATIONS.
   The Constitution delegates to the electors of cities and villages, not to the legislature, authority to determine for themselves the local laws which shall regulate their municipal affairs.

3. CONSTITUTIONAL LAW—STATUTES — AMENDMENT OF CHARTER — MUNICIPAL CORPORATIONS.
   Section 21 of Act No. 203, Pub. Acts 1911, authorizing cities to amend their charters without revising them under the Constitution, and statutes passed pursuant thereto, is invalid.

Mandamus by Franz C. Kuhn, attorney general, on the relation of James Vernor, against the common council and election commission of the city of Detroit to require the respondents to submit at a special election a proposed amendment to the municipal charter. Submitted January 12, 1912. (Calendar No. 24,965.) Writ denied January 15, 1912.

Graves & Hatch and *Edward G. Wasey*, for relator.

Richard I. Lawson (*Edmund Atkinson*, of counsel), for respondents.

Hinton E. Spalding and *Henry E. Bodman*, for respondents, by leave of the court.

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BLAIR, J. The city of Detroit is a municipal corporation with a charter granted under the Constitution of 1850 and thus antedating the Constitution of 1909. There has been no general revision of the charter under any act of the legislature since the Constitution of 1909 went into effect.

On August 15, 1911, the common council commenced appropriate proceedings under the provision of Act No. 279, Pub. Acts 1909, as amended by Act No. 203, Pub. Acts 1911, to amend the charter so as to institute a system of civil service, and these proceedings followed strictly the requirements of the legislature aforesaid in the following manner:

(*a*) The resolutions containing the complete amendment and a direction that it be submitted to the electors "at the next special or general election held in the city" were introduced on August 15, 1911, and laid on the table for 30 days. (*b*) The amendment was published in the official paper on August 16, 1911. (*c*) The amendment was adopted by the affirmative vote of more than two-thirds of the members-elect of the common council on September 26, 1911. (*d*) The amendment was transmitted to the governor and by him approved on October 10, 1911 and returned to the city clerk.

On December 26, 1911, a special election was called to be held in the city of Detroit on January 23, 1912, and this is the first election, either special or general, held or to be held since September 26, 1911.

On December 26, 1911, the common council ordered to be submitted to the electors at the proposed election two propositions, and no others, and neither of these two propositions is the amendment relating to the system of civil service.

One of the propositions ordered to be submitted relates to the so-called municipal ownership of the street car lines in the city of Detroit, and is an amendment to the existing charter proposed under the same statutes (Act No. 279, Pub. Acts 1909, as amended by Act No. 203, Pub. Acts 1911), that the amendment concerning a system of civil service is proposed.

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The election commission of the city of Detroit obeyed the instruction of the common council, and has arranged for the election on January 23, 1912, submitting the proposition relating to municipal ownership, but omitting the proposition relating to civil service.

The present proceeding is an application for a writ of mandamus to require the submission to the electors at the election on January 23, 1912, the amendment relating to the system of civil service, and the application is made directly to this court by reason of the importance of the public questions directly and indirectly involved and the necessity of haste because of the imminence of the election.

There are only two questions presented by the briefs which appear to us to require consideration, viz.:

(1) Does Act No. 279, Pub. Acts 1909, as amended by Act No. 203, Pub. Acts 1911, permit the legislative body of a city to decide at what ensuing election it will submit an amendment originating in the body itself?

(2) Is the amendatory act of 1911 unconstitutional in so far as it authorizes the amendment of existing charters in advance of a general revision of the charter?

1. We construe the language of section 21 of the act of 1909, as well as of the amended section of the act of 1911, relative to the submission of amendments, to require such submission at the next ensuing election, whether general or special.

2. Section 21 of Act No. 203, Pub. Acts 1911, provides:

"Any existing charter, whether passed pursuant to the provisions of this act or by the State legislature, may from time to time be amended as follows," etc.

The provisions of the Constitution relative to the incorporation of cities and villages were intended to and did delegate to the electors thereof, and not to the legislature, the authority to determine for themselves the local laws which should regulate their municipal affairs. *Jackson Common Council* v. *Harrington*, 160 Mich. 550 (125 N. W. 383); *Attorney General* v. *Detroit Common Council*, 164 Mich. 369 (129 N. W. 879).

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The authority of the legislature is limited to the passage of "a general law for the incorporation of cities" and villages, which must limit "their rate of taxation for municipal purposes and restrict their powers of borrowing money, and contracting debts." Const. art. 8, § 20.

"Under such general laws the electors of each city and village shall have power and authority to frame, adopt and amend its charter," etc. Const. art. 8, § 21.

Aside from embodying in "such general laws" the restrictions required by section 20 and the embodying of general limitations in accordance with the Constitution and general laws of the State, the province of the legislature is to provide for the method in pursuance whereof "the electors of each city and village shall have power and authority to frame, adopt and amend its charter." Const. art. 8, § 21.

And as we held in *Jackson Common Council* v. *Harrington*, *supra*, a general revision of an old charter may be treated as equivalent to the framing of a new charter. Necessarily, the revising of an old charter under the new general law would be in conformity with such general law and would follow its mandates and inhibitions to the same extent as in the framing of a new charter.

Not so in case of mere amendments to specific sections, which might leave the charters repugnant to the general law adopted under article 8, § 20, of the Constitution, so that cities claiming to operate under a general law intended to operate uniformly upon the local legislatures of all cities would be subject to such limitations as they should choose to accept and might adopt such provisions as they deemed beneficial.

Such a construction, in our opinion, is in contravention of the constitutional provisions as interpreted by this court in *Attorney General* v. *Detroit Common Council*, *supra*. *Vide* 164 Mich. 388 (129 N. W. 879).

We hold, therefore, that the provision of section 21 of Act No. 203, Pub. Acts 1911, authorizing the amend-

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ment of any existing charter, is unconstitutional and void.

The writ is therefore denied, but without costs.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, STONE, and OSTRANDER, JJ., concurred.

BIRD, J., did not sit.

STRACHAN v. MEYERING.

FRAUD — TRIAL — DIRECTING VERDICT ON OPENING STATEMENT — BROKERS.

Upon plaintiff's opening statement showing that the action was brought for false representations of defendants in a real estate deal wherein defendants, acting as brokers, induced plaintiff to pay $30,000 for certain apartments by stating to plaintiff that this was the lowest sum at which the owners would sell, although the owners' price was $24,000, the brokers receiving all they could secure above that amount, and although plaintiff claimed to have paid defendants $200 to secure for him the lowest price, the court erred in directing a verdict for defendants without receiving proofs; the question of fraud was for the jury.

Error to Wayne; Murfin, J. Submitted June 26, 1911. (Docket No. 34.) Decided January 23, 1912.

Case by James Strachan against John H. Meyering and another for fraud. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

George A. Safford, for appellant.

Walker & Spalding, for appellees.

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MOORE, C. J. The plaintiff holds an assignment of any claim his wife has against defendants. It is his claim that he is entitled to recover a large sum because of false representations made to himself and wife by the defendants, who were in the real estate business.

The trial of the case was entered upon and some testimony taken, when the following occurred:

"*The Court:* If I understand from your opening, Mr. Safford, and from this case as it has thus far developed, you make no claim that there was any representation as to the value of this property as a result of which you were defrauded?

"*Mr. Safford:* No.

"*The Court:* But it is your claim that the representation was made because the Morrises were very hard up; that they were compelled to and would therefore sell it at a sacrifice; that selling at a sacrifice, $30,000 was the very least they would take for it.

"*Mr. Safford:* That was the final, $30,000. First $35,000, then dropped to $32,000, finally down to $30,000.

"*The Court:* Finally $30,000?

"*Mr. Safford:* Yes.

"*The Court:* Those two statements, or those two circumstances, constitute the gist of this action, do they not?

"*Mr. Safford:* I believe it.

"*The Court:* Take this case in its facts as thus far developed, and the preliminary portion of it is not controverted that this property was listed with these defendants by its former owner for $25,000 net to them. There is no talk as to what their commission is to be, or anything else. We will assume, for the purpose of this present discussion, that they were to realize, as their commission, whatever they could get over and above $25,000 for it. Where is the line of demarcation? Are they compelled, even when they have property on sale for those terms, to sell it for just such a figure as will give them the board rate, or may they not sell it, if they are fortunate enough to do so, for $50,000 and keep the balance?

"*Mr. Safford:* That depends entirely upon circumstances, may the court please. The law will not permit a man to retain the fruits of his falsehood, if that falsehood is such as is material to the matter under consideration, and does lead the party acting upon it to do some-

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thing which results in his injury. The principle is this: That it does not matter whether the transaction is a profitable one or not, if it is brought about by falsehood or misrepresentation; the law will not permit a man guilty of that misrepresentation to retain the fruits of his fraud. It does not matter whether it comes from misrepresentation as to the value of the property or misrepresentation as to what the owner of the property will sell it for."

In the course of the discussion, the following took place:

"*The Court:* It resolves itself into, after all, a discussion as to whether or not the representation is a material representation?

"*Mr. Safford:* Certainly. Here is a case where a person represents the owner. He is in a position to know what the owner will take for the property, what the owner's selling price is on that property. He tells this man that $30,000 is the lowest figure at which they would sell the property.

"*The Court:* What have your clients lost by this, if there is no question about it being worth $30,000?

"*Mr. Safford:* The question of its value does not come into this case at all. We don't know today whether it is worth $30,000 or not.

"*The Court:* Then what have you lost?

"*Mr. Safford:* We have lost this.

"*The Court:* Suppose he has got for $30,000 a piece of property worth $50,000. May he maintain an action because he did not get it cheaper than that?

"*Mr. Safford:* Absolutely he may, providing, if the court please, that he was induced to pay more than he should have been required to pay, had the truth been told him. A real estate agent does not have absolute authority to misrepresent the facts any more than an attorney has. Another thing, if the court please, right here is something in the very contract or proposal that they have for the $30,000. From this it appears that they promised him they would do the very best they could do for him, and he agreed to pay them $200 for doing it.

"*The Court:* Which is the most reprehensible and unconscionable arrangement to make.

"*Mr. Safford:* No doubt about it—

"*The Court:* Do you think I am going to countenance any such arrangement as that in this courtroom?

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"*Mr. Safford:* The situation is this—

"*The Court:* His buying the other man's agent is not very commendable, and clearly not enforceable.

"*Mr. Safford:* That is true enough, but we are not seeking to enforce it. But it shows this: That between the Meyerings and Mr. Strachan there was a confidential relation existing.

"*The Court:* I don't agree with you. Whatever confidential relation there was existing between these people was a most unconscionable one."

Thereupon, after some colloquy between court and counsel, citation of authorities and discussion of the case, it was agreed that the opening statement of counsel might be considered as an offer of proof, and the jury was called in and directed to find a verdict for defendant.

The course taken makes it necessary to refer to the opening address. It was stated therein, in substance, that defendants had the Wilbert Apartments for sale in Detroit, and that because of their extravagance the owners wanted to sell them, and their price was $35,000. We now quote:

"That, either in that conversation or some of the conversations had there, Mr. Strachan expressed a desire to get the property, if he got it at all, for the lowest possible figure. He offered the Meyerings the sum of $200, in addition to what commission they might get from the Morrises, to get him the best possible figure they could get for the property. We expect to show a number of details showing how he worked himself into the confidence of these people. I don't care to relate them now, but we expect to show to you that before he left on that occasion he had gotten the confidence of Mr. and Mrs. Strachan to the extent that they authorized him to make a contract for them involving the outlay of $25,000, without their having seen the property; relied upon him to give them the very best offer that the Morrises would take on that property, if they would not sell for $25,000. After his return to Detroit, further correspondence was had between them. That finally the Meyerings notified Mr. Strachan that the best they could possibly do with Mrs. Morris was $32,000, and advised him to take it up then, if they didn't want to have it snapped up quick at that figure, or words to that effect. But that Mr. Strachan either wrote or

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wired back to the effect that it was $30,000 or no deal. Shortly after that, he received instructions to come on to Detroit to close up the deal. When he got here to Detroit, he saw one or both of the Meyerings, and wanted an introduction to either Mr. or Mrs. Morris to see if he could not get the property at a little better figure than $30,000, but they told him there was no use for him to see them. 'We have the sale of this property, and it will simply spoil the whole deal if you go talking with them. We can do better with them than you can do.' So they made appointments with Mr. Strachan at one place, made appointments with Mr. and Mrs. Morris elsewhere, and kept the parties apart until the day that the contract was finally consummated. That finally it was reported to Mr. Strachan that the lowest price at which they would sell the apartment was $30,000. By the way, in place of being a sale, it was really a trade; the bargain or understanding being between the Meyerings, representing Mrs. Morris, and Mr. Strachan that Mr. Strachan's property at the Soo should be taken in at a valuation of $10,000; it being one of the objects of Mr. Meyering, he claimed, to examine that property when he came to the Soo to see whether it was worth what Mr. Strachan claimed it was worth. That they made some other investigations. But the real transaction was a trade of the Soo property for the Wilbert apartments; the Soo property being taken in at $10,000, and the Wilbert Apartments at $30,000. Upon the Wilbert Apartments there was then a $12,000 mortgage, subject to which Mr. Strachan was to take it. He was to pay $2,000 in cash, and either give a second mortgage back for $6,000, or take a contract for the $6,000 and buy the Wilbert Apartments subject to the $12,000 mortgage. We expect to show that the Meyerings represented to Mr. and Mrs. Strachan that because of the financial straits of the Morrises that it was absolutely essential that they should get at least $7,000 in cash in the transaction some way. * * * But, at any rate, the deal was carried through, and the net result of the transaction was this: That Mr. Morris received all that he asked for the property, all that they asked for the property, which was $24,000 net. That before these negotiations were opened up at all, and at the time the Meyerings first represented to Mr. Strachan that Mrs. Morris wanted $35,000 for her property, and that was a great sacrifice, that before that time she had placed the property

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with the Meyerings, and authorized them to sell it for $24,000 net. Whatever they got above that would be their commission. She wanted $24,000 net for the property, and was willing to take $6,000 in money, sell the property subject to a second mortgage, or upon contract for the $6,000 remaining, and subject to the $12,000 mortgage on the property. Those facts were kept from Mr. Strachan."

There were many other things stated in the opening, but we think this sufficient to show the question involved.

Counsel for defendants say the leading case applicable to this one is *Vernon* v. *Keys*, 12 East, 632, and that the course taken by the trial judge was proper. It is contended the case is controlled by the recent case of *Hokanson* v. *Oatman*, 165 Mich. 512 (131 N. W. 111). We do not know what may develop when the proofs are taken, but we think counsel should have been allowed to put in his testimony and have the jury pass upon the case when all the proofs are in, under proper instructions from the judge.

Judgment is reversed, and a new trial ordered.

McALVAY, STONE, and BIRD, JJ., concurred with MOORE, C. J. OSTRANDER, J., concurred in the result.

STEWARD *v.* TRAVERSE CITY STATE BANK.

1. TRUSTS—MORTGAGES—ACCOUNTING—DEBTOR AND CREDITOR—NEGLIGENCE.

Where one of two partners engaged in the manufacture of lumber products executed a note to defendant bank in order to obtain money to cover a shortage in public funds controlled by him, and also executed a mortgage upon his partnership and other property to an officer of the creditor, agree-

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ing that the creditor or its officer should have the right to take possession of the real and personal property conveyed but not of the lumbering business, if at any time they deemed themselves insecure, and where the said officer thereafter took possession of the lumbering business, with the knowledge and consent of the debtor, leaving the partner in control as manager, the relation between the creditor's representative and the debtor was that of trustee and beneficiary and in the conduct of the business the trustee owed the duty to exercise ordinary care and prudence to avoid losses, overcharges, and unreasonable expenditures.

2. SAME.

It was error, in an accounting in equity, to charge the creditor or its representative with the value of any of the property employed in the business on the theory that it was wrongfully appropriated, under a bill of complaint framed on the theory that complainant was entitled to an accounting for the profits of the business and to have them applied in reduction of complainant's debt, and containing no averment that complainant gave no authority to take possession of the business.

Appeal from Grand Traverse; Mayne, J. Submitted June 26, 1911. (Docket No. 62.) Decided January 23, 1912.

Bill by George W. Steward against the Traverse City State Bank, Samuel Garland, executor of the estate of Julius T. Hannah, deceased, and Elsie R. Hannah, as executrix thereof, for an accounting. From a decree for complainant, defendants appeal. Reversed and remanded for further proofs.

Covell & Cross, for complainant.

Pratt & Davis and *Parm C. Gilbert*, for defendants.

Complainant executed and delivered an instrument, reading:

"$6,000.00.

"TRAVERSE CITY, MICH., Oct. 17, 1904.

"On demand after date, I promise to pay to the order of Traverse City State Bank six thousand and no-100 dollars, at the Traverse City State Bank, for value received,

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with interest at the rate of seven per cent. per annum after date. Having deposited and pledged with Julius T. Hannah as collateral security for the payment of this note, and any other indebtedness due and to become due from me to said Traverse City State Bank, its assigns, property at 422 West Eleventh street, 433 West Seventh street, 256 East Ninth street, lot 14, block 16, city of Traverse City, Mich., also W. fract. 1-2 of N. W. fract. 1-4 Sec. 6, Tp. 25 N. R. 10 West, and certain lands in So. Boardman and Wilson Tp., and bill of sale of all personal property in Boardman Tp., title held by J. T. Hannah as collateral for this note.

"I hereby authorize the sale of said security at public or private sale or otherwise, and with or without notice, on the nonperformance of these promises and said Traverse City State Bank or Julius T. Hannah may become the purchaser thereof, and it is hereby agreed that if the said security, in the opinion of said Julius T. Hannah, shall depreciate in value, said Julius T. Hannah may elect without notice that this obligation is due and payable on demand.

"It is further agreed that the said Traverse City State Bank or Julius T. Hannah shall have a right to hold and apply, at any time, on my own indebtedness or liability to the maker hereof, as security for the payment of any liability due or to become due from the maker hereof.

"GEORGE W. STEWARD."

He also executed and delivered to Julius T. Hannah conveyances of real estate and a bill of sale of certain personal property, all as indicated in said written instrument. The form of the said conveyances imported the transfer of title to all of the property to said Hannah. The deeds of real estate were recorded. Before he died, which was November 25, 1905, Mr. Hannah sold portions of the said real estate and personal property. After his death, his executors, one or both acting in that behalf, sold other of the real estate and personal property. Certain rents were received by or for the said Hannah or by his executors, and some of the property so conveyed as security has not been disposed of. Some time in December, 1906, or January, 1907, complainant filed his bill of complaint against said executors and the Traverse City

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State Bank, charging among other things, that, at the time the said promissory note was executed and the said security for its payment was given, complainant was engaged in lumbering certain of the said lands in Kalkaska county and in manufacturing lumber and shingles from the timber thereon; that Julius T. Hannah at once, or soon, took exclusive control of such operations; that after his death the operations were continued by his executor, Garland; that they cut, removed, manufactured, and sold quantities of lumber and shingles and sawlogs, the profits of which operations ought to be credited to complainant, and when credited would extinguish the said indebtedness and show a balance due to complainant. An accounting was prayed for. Issue was joined, proofs taken, and a decree was entered August 26, 1909 (which is also a statement of the account), requiring the defendants to pay to complainant the sum of $4,110.87, with interest and costs, and to convey certain of the property remaining undisposed of.

The court found:

"That during the fall of 1904, complainant George W. Steward and one George Payn were engaged in the manufacture of lumber and shingles at Crofton, in the county of Kalkaska and State of Michigan; that the arrangements between Steward and Payn would probably amount to partnership, and Payn was the manager and had personal supervision of the business; that the title to the real estate from which the timber was taken was in complainant, he having furnished the money with which it was purchased, and also the money to carry on the lumbering operations; that Steward and Payn had an open account with the Hannah & Lay Mercantile Company, of Traverse City, Mich., for supplies furnished to them; that Julius T. Hannah was interested in the Hannah & Lay Mercantile Company and was also in the Traverse City State Bank; that on October 17, 1904, complainant, Steward, being in need of money for his individual use, made a loan with the Traverse City State Bank; Julius T. Hannah, who was an officer of the bank, negotiating the same; that to secure the payment of said loan, complainant, Steward, gave his note for $6,000, with interest

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at the rate of 7 per cent. per annum, to the Traverse City State Bank, and transferred to Julius T. Hannah the several parcels of real estate described in the bill of complaint in this cause, including the timbered lands in Kalkaska county then being operated by Steward and Payn, also the manufactured products then on hand, consisting of logs, lumber, and shingles, also teams, tools, etc., used in carrying on the lumbering operations. No change was made in the Steward & Payn contracts, and no settlement of the partnership matter was had. That the purpose of the transfer of the real estate and personal property from complainant to Julius T. Hannah was to secure the payment of said $6,000 note and any other indebtedness due or to become due from complainant to the said Traverse City State Bank. That by the terms of said note Julius T. Hannah was given the right, upon deeming himself insecure, to take possession of the real estate and personal property, to sell the same at public auction or private sale. Also, he was given the right to buy the same in his own name or the name of the Traverse City State Bank. That no authority was given Julius T. Hannah to take possession of the lumbering operations and continue the business. That Steward & Payn remained in possession of the lumbering business and continued to manufacture lumber and shingles until March 20, 1905. That Julius T. Hannah sold certain of the real estate at different times, and on March 20, 1905, took possession of all the property and turned the lumbering operations over to Payn, who thereafter carried it on for Julius T. Hannah. That complainant, Steward, had no control of the property or business after March 20, 1905. Payn continued operations, manufactured shingles, lumber, posts, and other forest products; Hannah advancing the money to him to enable him to carry on the business. That under the terms of the conveyance of the real estate and personal property, Hannah had no authority to continue the business, and the complainant is not responsible for losses that were sustained after March 20, 1905. That in taking possession of the goods and handling them as he did, Hannah, if he did not actually sell the goods and buy them, as provided by the contract between himself and Steward, in effect, by taking possession and operating the business, he did so. That on the 25th day of November, 1905, Julius T. Hannah died, leaving a last will and testament, wherein he appointed Samuel Garland and Elsie

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R. Hannah his executor and executrix, and that thereafter said executors sold certain of the real estate, timber, and personal property which had been transferred by complainant to said Julius T. Hannah as security for the payment of said indebtedness, and that there is certain of said real estate yet remaining undisposed of."

The account is stated upon the basis:

"That the complainant should be debited with the indebtedness due from Steward & Payn to the Hannah & Lay Mercantile Company and unpaid on October 17, 1904; also, the taxes, insurance and other legitimate expenditures in relation to the real estate; also, all amounts furnished or advanced by Julius T. Hannah for the purpose of carrying on the lumbering operations up to and including March 20, 1905. That the complainant should be credited with the rents and the moneys received from the sale of lumber, shingles, received from the real estate, the money received by Julius T. Hannah from the sale of real estate during his lifetime, and other forest products and personal property previous to March 20, 1905. That the complainant is also entitled to credit for the actual cash value of logs, lumber, shingles, and other forest products and personal property, possession of which was taken by Julius T. Hannah on March 20, 1905; also, the actual cash value of all real estate, timber, and personal property sold by the executors after the death of Julius T. Hannah."

Both parties claimed to have appealed, although defendants say that complainant has not properly done so. In the brief for complainant it is said:

"It is claimed by the defendants that, in addition to being given credit for the face of the note and interest thereon, they should also be given credit for all moneys advanced by Mr. Hannah to Payn, irrespective of the use which Payn made of such money; that they should also be credited with the amount of merchandise claimed to have been shipped to Crofton upon orders from Payn, and O. K.'d by Hannah, including a balance due to the Hannah & Lay Mercantile Company, from Seward at the time the transfer of the property was made, and that the complainant should bear whatever loss was sustained in the lumbering operations, whether such loss resulted from the mismanagement or dishonesty of Payn, or from other causes. The complainant contends that the trust created

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by the terms of the note, and the transfer of the property to Hannah, merely authorized Hannah to sell the property and apply the proceeds to the satisfaction of the note, and did not authorize him to continue the lumbering operations; and that the defendants should be charged with the actual value of the property received, irrespective of the result of the lumbering operations. The complainant further contends that, even though Mr. Hannah was authorized to continue the lumbering operations, he was guilty of such gross negligence in looking after the matter that he should be held responsible for the actual value of the property, irrespective of the results of the lumbering operations. The complainant also contends that the circuit judge was in error in determining that Mr. Hannah did not take possession of the personal property until March 20, 1905, but that it should be found, as a matter of fact, that Mr. Hannah took possession of all of the property on October 17, 1904, and should be required to account for such property as of that date. No question is raised by the complainant in regard to the prices at which the various parcels of the real estate were sold by Mr. Hannah during his lifetime, and practically the entire controversy centers upon the question of the right of Hannah to carry on these lumbering operations during his lifetime, and the right of his executors to continue such operations after his decease."

For defendants, it is asserted that complainant had knowledge of the lumbering operations and of the application of all moneys received on account of them; that:

"Complainant filed his bill of complaint referring to all these transactions and asking in the numerous paragraphs of such bill that the moneys received by Julius T. Hannah and the Traverse City State Bank, and later the executors of Julius T. Hannah, deceased, should be accounted for as trust funds. The defendants met this bill by saying that they were ready to account for all moneys received, and the defendants' statement summarized is found in their answer. The total amount received, as shown by this statement, is $14,949.73. The cash paid out for supplies, later, and operating expenses was $10,384.49. The balance, $4,565.24, was applied on the note. The amount of the note was $6,000, beside interest. These figures include all the operating expenses except a few items that will be referred to in the argument, and leave a balance

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owing by complainant at the commencement of this suit, according to this statement, of about $1,500. There is no claim in the bill of complaint that defendants wrongfully disposed of or used the property in any way, nor any claim that complainant did not know of all the operations substantially as they occurred; but, on the contrary, the bill of complaint was drawn on the theory that such moneys as had been actually received and resulting from the operations should be treated as trust funds, the only inquiry being how much those proceeds amounted to."

They ask that the decree rendered be reversed, that the court enforce the rule that, "where a beneficiary either expressly or impliedly assents to the action of his trustee in managing his property not in strict accord with the terms of the trust, he will be held to have acquiesced in such action," and that a decree be entered for defendants (they having asked for affirmative relief) for $1,288.19. Incidental to this, the main contentions of the parties are certain questions concerning the admissibility of testimony.

OSTRANDER, J. (*after stating the facts*). It is apparent that in the court below, and in this court, the real differences of the parties concern the actual and legal relation of Mr. Hannah and his executors to the property embarked in, and the product of the lumbering and manufacturing operations carried on by complainant and his partner, Payn, and afterwards by Mr. Hannah and his representatives. To understand this relation, some reference must be made to the testimony. That establishes, I think, the following facts: The debt evidenced by the note of complainant which is above set out was not, in its inception, the ordinary debt created by the lending of money. Complainant was a public officer, and Mr. Hannah was his surety, or was one of his sureties. A discrepancy, or shortage, in his accounts was made good by Mr. Hannah. The note represents the whole or a part of this sum, and the security given was, as we infer from the record, such as complainant could furnish. The Kalkaska

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lands were then being lumbered by complainant and one George Payn, who had made various contracts with various persons for the putting in of logs, the hauling of cordwood, and the manufacture of the logs into lumber and shingles. The sale of the manufactured products had been arranged for, and credit had already been extended to Steward & Payn on account of the operations, and in turn they had advanced to contractors money so that some of them were indebted to the firm. Roads had been built from the land to the place where the logs were to be delivered for manufacture. Mr. Payn had an interest in the land (the title being held by complainant) and in the proceeds of the lumbering operations and had principal charge of the business of Steward & Payn, or Payn & Steward, so being carried on. Matters were in this condition when complainant proposed those lands and the personal property used thereon in conducting the logging operations, and the logs and lumber already cut, as security for his debt. Mr. Hannah consulted with Mr. Payn, and so did complainant. Payn agreed that he would consent to the proposal if he could continue in charge of the work. I do not know just what Payn's interest was; but it is clear that both complainant and Hannah considered that he had an interest, and that his consent should be secured.

That complainant understood that the lumbering and manufacturing were to be continued is, in my judgment, made clear, and that he participated therein, after turning the property over to Mr. Hannah, is equally clear. I find that the understanding was mutual. I do not perceive any legal objection to the arrangement; all parties in interest consenting thereto. It is true the property was turned out as security for a debt, and Mr. Hannah was empowered to sell it. But I do not understand how complainant can now object to the legality of the further arrangement according to which the personal property, such as horses and equipage, was continued in the service in which it was already engaged, or by what right he may now complain that instead of selling the property, includ-

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ing the land, thus interrupting all contracts which had been made by Steward & Payn, the timber was manufactured as he agreed it should be. The business was carried on, under the arrangement, from October until March. Of this fact there can be no doubt. It was thereafter continued, without any protest or demand on the part of complainant. Mr. Hannah had as much and the same authority to continue the business after March, 1905, as before that time. That complainant had little, if anything, to do with the business after March, 1905, is not a fact of any importance. That Mr. Hannah declined to proceed with the business if it was to be managed by complainant, or if he was to be employed at wages, is a fact easily accounted for. The understanding from the beginning was that Payn, and not complainant, should be manager, and to this complainant assented. The bill of complaint was filed long afterwards. It is framed according to the theory that complainant is entitled to an accounting and to have the fair and reasonable profits arising from the business applied in reduction of his debt. It is not intimated therein that authority to carry on the business had not been given. Complainant took the chances of a profit to be produced by Payn's management, to which he expressly agreed, and Hannah's capital, which he knew was being used. He never protested, never demanded, and never was refused, information. I am of opinion that in so far as the account is stated according to the theory that any of the defendants should be charged, on March 20, 1905, or on any other day, with appropriating any of the property, or with dealing with it without authority, it is wrongly stated.

It does not follow, however, that Mr. Hannah had the right to exercise no care, or indifferent care, with respect to the enterprise. The agreement that Payn should manage the business did not relieve Mr. Hannah from all responsibility. His advances of cash and of merchandise were items of the cost of running the business, to be repaid before a profit would be shown. He was under some

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obligation to see to it that disbursements were properly made; that accounts were properly kept. It appears that he gave the matter little or no attention, but advanced cash and merchandise, upon the demand of Payn, without supervision and with little inquiry. Probably no one may be truthfully charged with dishonesty. Yet it is clear that Payn permitted Harrington, who boarded some of his men, to be constantly and increasingly overpaid, when the exercise of ordinary business sense would have prevented such a result. Complainant should not be charged with such a loss. As to the amount of the indebtedness of certain contractors who were overpaid, the conclusion, upon this record, cannot be so certain. Their accounts were not closed when Hannah took over the property, and it seems that then they had been, to some extent, overpaid. But the testimony tends strongly to show that ordinary business prudence would have prevented further considerable overpayments. Taking over this business, as Mr. Hannah did, at the stage to which it had then been brought, continuing it after the manner in which it had theretofore been conducted, without changing or revoking contracts already made by complainant, Mr. Hannah did not insure the success of the business or agree that it should show a profit. In so far as losses can be traced to his failure, or to the failure of his representatives, to exercise ordinary care and prudence in conducting the business as it was conducted, they should be borne by defendants. It is impracticable for this court to state an account in accordance with the indicated rule.

The decree will be reversed, and the record remanded for that purpose. Neither party will recover costs of this appeal as against the other, and, inasmuch as both claim to have appealed from the decree, the cost of preparing and printing the record, exclusive of counsel's fees therefor, will be equally divided.

MOORE, C. J., and BROOKE, STONE, and BIRD, JJ., concurred.

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MOLONEY v. GERMANIA FIRE INSURANCE CO.

1. INSURANCE—PRINCIPAL AND AGENT—NOTICE—CHATTEL MORTGAGE—INCUMBRANCE.
   Notice to a solicitor of fire insurance, who induced insured to take out a policy, that a chattel mortgage existed on the property, was not notice to defendant company, which was not shown to have employed the solicitor and had only one agent, by whom the solicitor was employed, in the county where the policy was written.

2. SAME—WAIVER—ESTOPPEL.
   Where defendant's insurance adjuster, at the time he made out proofs of loss, was informed of the existence of an incumbrance on the insured property, and the insurer did not learn of the fact until later, and no assurance was given or act done on which the insured relied to his prejudice, a delay of about sixty days in notifying him that the company refused to pay was not a waiver of the defense, nor did the delay estop defendant from urging it.

3. SAME—COMPROMISE.
   Held, that no sufficient evidence of any compromise made by the insurance adjuster appeared.

Error to Chippewa; Steere, J. Submitted April 14, 1911. (Docket No. 90.) Decided January 23, 1912.

Assumpsit by John F. Moloney and others as assignees of Thomas McRae against the Germania Fire Insurance Company upon a policy of insurance. Judgment for plaintiffs. Defendant brings error. Reversed and no new trial ordered.

Davidson & Hudson (*Wilkinson & Younglove*, of counsel), for appellant.

F. T. McDonald, for appellees.

OSTRANDER, J. The defendant, a foreign corporation, issued its policy of insurance to Thomas McRae, plaintiffs'

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assignor, in and by which it promised said McRae indemnity for loss by fire upon his stock of liquors, tobacco, saloon fixtures, and furniture, including a cash register, in the sum of $500, from August 24, 1908, to August 24, 1909. The property, which was situated at Brimley, Chippewa county, Mich., was entirely destroyed by fire October 21, 1908, after which McRae assigned his policy and demand against the defendant to the plaintiffs, who later on began suit upon the policy, which resulted in a verdict and judgment in their favor.

Appellant has discussed its assignments of errors under the following heads:

"(1) The defendant was entitled to a directed verdict, because it conclusively appeared that McRae made false statements in his proof of loss regarding the amount and value of property destroyed by the fire.

"(2) The defendant was entitled to a directed verdict, because it conclusively appeared that McRae made false verbal statements to Mr. Wright and false written statements in his proof of loss regarding the chattel mortgage.

"(3) The policy was void (not merely voidable) at the time of the fire; there being a chattel mortgage on a portion of the property insured not disclosed to the insurer.

"(4) At the time of the fire, the defendant had an absolute defense by reason of the chattel mortgage. Mr. Wright, employed as an independent adjuster, had no authority to revive the policy and waive that defense.

"(5) If it be held that Mr. Wright had authority to waive the chattel mortgage defense, then such waiver must be in writing on account of the provision of the policy requiring written indorsement or an addition to the policy.

"(6) Assuming for the purpose of this paragraph that Mr. Wright was told of the existence of a chattel mortgage, and did attempt to ignore or waive it as a defense in this matter, nevertheless the insurance company is not bound by such action on his part for the reason that there was absolutely no consideration for such a waiver.

"(7) Conclusion."

As to the first and second of these propositions, it is enough to say that they involve disputed questions of fact

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which were submitted to the jury. As to the others, they present the single question whether, under the circumstances disclosed by the record, the policy was void because at the time it was issued, and at the time of the fire, there was an undisclosed chattel mortgage upon a portion of the property insured. To answer this question involves an examination of testimony, and, so far as appears to be necessary, the testimony examined will be referred to.

In May, 1908, the insured borrowed $300 from the Soo Brewing Company to pay his tax as a liquor dealer; and, to secure this loan, he gave the chattel mortgage which is in question here. It was not filed at Brimley, but was filed at Sault Ste. Marie. It called for payment in six monthly installments. At this time McRae held a policy, insuring the same property, issued by the defendant in August, 1907, expiring in August, 1908. When it expired, the policy in suit was issued. Neither policy contained any permission or consent of the company, or any evidence of any consent or waiver of the company, with respect to the chattel mortgage. William J. Miller, the man who delivered the insurance policies and collected the premiums, drew the chattel mortgage, and signed it as a witness. His connection with the defendant company, if he had any, does not appear. He solicited McRae to place the insurance; he delivered the policies to McRae; he collected the premiums; he notified the agents of the company at Sault Ste. Marie after the fire that a fire had occurred, received a letter in reply, and gave the reply to McRae. The policies were issued at Sault Ste. Marie by the Adams Insurance Agency, are countersigned by the agency, and the undisputed testimony of the State agent of the company is that the company never had an agent in Chippewa county except the Adams Insurance Agency. It does not appear that the defendant ever heard, or knew, anything about Mr. Miller. We assume that he was acting for the Adams Insurance Agency in securing the business. The trial judge, in the charge to the jury, said that the disclosed connection of Mr. Miller

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with the matter was not one which warranted them in finding that the company was bound by any notice he had of the existence of a chattel mortgage. As we are of opinion that this instruction conforms with the testimony and the law, we may dismiss Mr. Miller and his connection with the matter from further consideration.

The policy was void when the fire occurred, but the defendant company had no knowledge of the fact which made it void. McRae was notified that Mr. William S. Wright would adjust the loss for the defendant company. Mr. Wright is an independent adjuster, living in Marquette, and he adjusts losses for the defendant company and for other companies. The matter of this loss was referred to him a few days after the fire, and he went to Brimley, and while there prepared, and McRae verified, proofs of loss, and forwarded the proofs of loss and his report to the State agent of defendant. It is the contention of the plaintiffs that Wright was informed by McRae of the existence of the mortgage, and that Wright's knowledge of the fact, coupled with what he did and said, is evidence of a waiver by defendant of the forfeiture of the policy. There is a clear dispute of testimony upon the question whether McRae informed Wright about the chattel mortgage. McRae testified that he advised Wright of the existence of the mortgage, and also testified:

"After we left Mr. Moloney's office, Mr. Wright told me that the law gave them 60 days to pay the claim; but, if I would throw off $5, they would settle in 20 or 30 days. I said I would agree to that."

We find in the record no other or further evidence of acts or statements upon which a claim of waiver, or estoppel, can by any possibility be based. There is no testimony tending to prove that Wright had in fact any authority from the defendant to do anything but adjust. Assuming that he was an agent of defendant, within the meaning of 2 Comp. Laws, § 7246 (see *Pollock* v. *Insurance Co.*, 127 Mich. 460 [86 N. W. 1017]), we think

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it must be said as matter of law that the court was in error in submitting the question of waiver to the jury. Counsel for appellees cites and relies upon a number of the decisions of this court which are not strictly in point. What is involved in the contention of plaintiffs is not a waiver by a principal or agent in the course of making a contract of a matter or thing which they have an undoubted power to waive—a waiver before the fact—but an estoppel which has the effect of reviving a liability, which, by the terms of an existing contract, is ended.

In *New York Central Ins. Co.* v. *Watson*, 23 Mich. 486–488, it was said, in considering the liability of an insurance company upon certain policies which, by their terms, and by the act or omission of the insured, were avoided:

"Nothing could revive them short of a new contract on valid consideration, or such conduct as, by misleading the insured to their prejudice, would operate as an estoppel. There is no item of testimony tending in the remotest degree to show that any such contract was made, or that the insured did anything by the encouragement of plaintiff in error or their lawful agents to their own prejudice, or anything which they would not have done under other circumstances. There is no evidence that the insurers knew anything about it."

In *Security Ins. Co.* v. *Fay*, 22 Mich. 468, 473 (7 Am. Rep. 670), in referring to earlier decisions, it is said:

"The waiver that is spoken of in these cases is another term for an estoppel. It can never arise by implication alone, except from some conduct which induces action in reliance upon it, to an extent that renders it a fraud to recede from what the party has been induced to expect."

In no case has this court gone further, in applying this doctrine of estoppel, than in the early case of *Pennsylvania Fire Ins. Co.* v. *Kittle*, 39 Mich. 51, 54. Upon this subject the opinion proceeds as follows:

"The facts submitted were that, after the loss, the adjusting agent of the defendant called upon the plaintiff,

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and, after investigation, made an offer to pay by way of compromise $375 [less than one-half the proper proportion of the loss], at the same time objecting to the taking out of the second insurance; that this offer was declined, and the agent went away, and soon after wrote the plaintiff that she might go on and make out her proofs, and the matter would then be taken into consideration; that subsequent correspondence took place between the agent and the plaintiff respecting the proofs, the former demanding more particularity in what was furnished, and it was not until six months after the offer for a settlement was made that the agent notified the plaintiff, who in the meantime had been endeavoring to make the proofs satisfactory, and to overcome the objections he was making thereto, that, 'in addition to the objections heretofore made,' the defendant would insist upon the forfeiture because of the second insurance.

"We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs, and by requiring her to be at the trouble and expense of correcting these to satisfy the criticism made by the agent, without giving her to understand the company would rely upon the forfeiture, should be held to have waived it; and that, if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith. We also think the jury would have a right to infer from the final letter of the agent that he understood the objection of forfeiture had not been insisted upon previously."

See, also, *Carpenter* v. *Insurance Co.*, 61 Mich. 635, 644 (28 N. W. 749); *Cleaver* v. *Insurance Co.*, 71 Mich. 414 (39 N. W. 571, 15 Am. St. Rep. 275); *Granger* v. *Assurance Co.*, 119 Mich. 177 (77 N. W. 693).

In the case at bar, the adjuster, as has been stated, made out the proofs of loss, and it is said by McRae that in making them out he asked about incumbrances, and was informed of the existence of the chattel mortgage. The proofs of loss, sworn to by McRae, state that the property was not incumbered. McRae testified that he did not read them, and that they were not read to him. He is disputed by the adjuster. It is undisputed that later on, having been informed by the defendant's State

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agent that the property was mortgaged, Wright called McRae by telephone, and asked him if there was a chattel mortgage on the property. He says McRae told him there was none, and that he then asked him to send him a certificate of the fact from the township clerk. Such a certificate was procured by McRae and sent, and it showed there was no mortgage on file in his office. McRae testified that he answered Wright's telephone message by saying, "Yes, I told you there was a mortgage on part of it," that he went to the township clerk, not knowing whether the mortgage had ever been filed, and procured the certificate that there was no mortgage on file there and sent the certificate to Wright with a letter reading:

"Inclosed you will find statement from township clerk. Hope this will be satisfactory. If there is any other information you would like, kindly let me know by return mail, as I would like to have this matter straightened up."

The testimony of the State agent of defendant tends to prove, and is not disputed, that, after receiving the proofs of loss and report from Wright, he sent them to the Chicago office of defendant, asking that the matter be held for 60 days, and that a report on McRae be procured. From the report he learned of the chattel mortgage, and upon corresponding with the Adams Insurance Agency received through them a certified copy of the mortgage, after which he communicated the fact to Mr. Wright. The proofs of loss were dated and sworn to November 6, 1908. Under date January 4, 1909, McRae and plaintiffs were notified that the defendant denied liability. It is evident that the insured did nothing because of any encouragement of defendant or its agent to his prejudice, or anything which he would not have done under other circumstances. It is not claimed that plaintiffs were prejudiced by any statement or conduct of defendant or its agents.

In argument, some attempt is made to support the idea that the adjuster and McRae made a settlement. This is based upon the testimony of McRae which is hereinbefore

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set out. Without discussing the question of the authority of Wright to make a settlement—to bind defendant to pay—or the right of McRae to settle a demand which he had already assigned to creditors, we think the testimony of what was said is not evidence of an admission and settlement of liability. And McRae must have understood from the inquiry thereafter made that whether there was or was not a chattel mortgage upon the insured property was regarded as an important fact.

The judgment is reversed. A new trial is not granted.

MOORE, C. J., and BLAIR, STONE, and BIRD, JJ., concurred.

JOHNSON *v.* CITY OF ESCANABA.

1. TAXATION — SPECIAL ASSESSMENTS — PAVING — MUNICIPAL CORPORATIONS—COMMON COUNCIL AS BOARD OF REVIEW.

   The revision of a special assessment roll for paving a street or the making of a new roll must be done by the board of assessors, not by the common council in reviewing the assessment. 1 Comp. Laws, § 3205.

2. SAME—STATUTES—REVISION—CORRECTIONS.

   The power of the common council to correct the roll as to any assessment or description does not authorize the council to adopt a new basis of distributing the tax; its authority is limited to corrections of mathematical errors in computing amounts or mistakes in descriptions of property assessed. 1 Comp. Laws, §§ 3193–3205.

Appeal from Delta: Cooper, J., presiding. Submitted November 13, 1911. (Docket No. 92.) Decided January 23, 1912.

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Bill by Carl A. Johnson and others against the city of Escanaba to set aside a special assessment. From a decree for defendant, complainants appeal. Reversed.

Arthur H. Ryall, for complainants.

I. C. Jennings, for defendant.

BLAIR, J. This suit was instituted by various taxpayers in the city of Escanaba to set aside a certain paving tax assessed against them for the improvement of Langley street in that city. None of the property of complainants fronts upon, or is adjacent to, Langley street, but all of their lots front upon streets intersecting that street at right angles. Langley street runs east and west, and the special assessment district determined upon by the council comprised one-half block north and one-half block south of said street between the east line of Stephenson avenue and the west line of Charlotte street. There were 4 lots north and 3½ lots south of Langley street.

In April, 1907, the street committee made a report to the council and recommended a plan of apportioning special assessments. This report was accepted and ordered placed on file. This method provided, in short, for the division into two equal parts of the total amount to be assessed in any particular district. One of these amounts was to be distributed among the various lots fronting upon the particular street to be improved, according to the frontage of the several lots so assessed. In other words, one-half of the cost of the improvement was to be assessed according to frontage; the other half was to be spread over the entire district according to the area of the several lots. This, however, was not to be spread equally according to area, but, as between the lots upon which this portion was computed, the amount to be assessed upon each lot varied with the distance from the corner. To illustrate: If the total area of four lots extending from the street improved down a side street amounted to 1,000 square yards, and the total amount to be assessed against

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these lots on account of the half to be assessed according to area amounted to $1,000, that sum would not be distributed equally over these four lots so as to assess each of them $250, but the corner lot would be assessed 50 per cent., or $500, and the second, 25 per cent., or $250, the third, 15 per cent., or $150, and the fourth, 10 per cent., or $100; or where these exact proportions were not used, other percentages were adopted for the distribution among the several lots, varying with the distance of the lots from the corner. The assessments complained of, as well as all other assessments made thereafter, were made in accordance with this plan, although the city engineer, who was *ex officio* a member of the board of special assessors, testified that the plan was merely used as a guide in aid of their discretion and not as binding their judgment.

Complainants contend (1) that the assessments were void because made according to a fixed and arbitrary plan and not according to benefits as directed by the council:

"*Second.* The action of the council in fixing this district was without jurisdiction and void for the reason that when this question was properly before the council in May, 1907, the whole matter was dropped and nothing further was done until July 20, 1909, at which time the district was fixed without a new notice being given.

"*Third.* The action of the council on September 7, 1909, was illegal in that it made (1) an entirely new assessment roll so far as amounts were concerned while its rights in this respect were limited to correcting the roll as to assessment or description of property, or (2) referring it back to the board for revision, or (3) annulling or ordering a new roll."

We consider the third point first. 1 Comp. Laws, §§ 3193, 3198, 3200, provide:

"There shall be a board of special assessors in every city, consisting of the city surveyor, and two other members, who shall be freeholders and electors in the city, to be appointed by the mayor, by and with the consent of the council. Their compensation shall be prescribed by the council. Special assessments authorized by this act shall be made by such board. * * *

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"When any special assessment is to be made *pro rata* upon the lots and premises in any special district, according to frontage or benefits, the council shall, by resolution, direct the same to be made by the board of assessors; and shall state therein the amount to be assessed and whether according to frontage or benefits; and describe or designate the lots and premises or locality constituting the district to be assessed.

"* * * If the assessment is directed to be according to benefits, they shall assess upon each lot such relative portion of the whole sum to be levied as shall be proportionate to the estimated benefit resulting to such lot from the improvement. When the board shall have completed the assessment they shall report the same to the council; such report to be signed by at least two of the assessors, may be in the form of a certificate, indorsed on the assessment roll, as follows:"

Section 3204 requires notice of the filing of the special assessment roll to be given and of the meeting of the council to consider objections thereto.

Section 3205 provides:

"At the time and place appointed for the purpose, as aforesaid, the council and board of assessors shall meet and there, or at some adjourned meeting, review the assessment and shall hear any objections to any assessment which may be made by any person deeming himself aggrieved thereby, and the council may correct said roll as to any assessment, or description of premises, appearing therein, and may confirm it as reported, or as corrected; or they may refer the assessment back to the board for revision; or annul it and direct a new assessment; in which case the same proceedings shall be had as in respect to the previous assessment. When a special assessment shall be confirmed, the city clerk shall make an indorsement upon the roll showing the date of confirmation."

In the instant case, Mr. Moe, a member of the board of special assessors, prepared the assessment roll, and under the heading "Amount Assessed" stated the amount to be assessed against each lot, according to his judgment of the benefit to such lot, and left it with the city clerk for consideration by the other assessors. On August 3, 1909, a

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motion was made and adopted that "the special assessment rolls for Langley and Sinclair streets be referred back to the board of special assessors for corrections, as only one of the special assessors had signed said roll." After the roll was referred back to the board of assessors, it was signed by Mr. Moe and Mr. Follo and filed. Later, Mr. Brotherton, the city engineer, signed it. Mr. Moe and Mr. Brotherton disagreed as to the method to be pursued in assessing the benefits, and after the roll was referred back to the board Mr. Moe put down in pencil under the heading "Remarks" the amounts according to Mr. Brotherton's method of arriving at the benefits. Mr. Moe testified that he made these figures "to help the council out, if they wanted it; but I understood in the first place it was referred back to me on account of it wasn't signed by more than one. Of course I didn't want to change my figures. I thought it was right, the first one I had."

At the meeting of the council on September 7, 1909, the following proceedings were taken:

"On motion of Ald. Valentine supported by Ald. St. Jacques a recess of ten minutes was taken in which the assessment rolls of Langley St. and Sinclair St. were reviewed. After the adjournment Mayor Greenhoot called the meeting to order. Ald. St. Jacques supported by Ald. McColl moved the adoption of the following resolution: Resolved, That the special assessment roll for the grading, paving, curbing, and draining of Langley St. from the east line of Stephenson Ave. to the west line of Charlotte St. be reviewed and revised by this council by changing the assessment of each piece and parcel of land described on said roll in accordance with the amounts set opposite each description on said roll in pencil in column headed 'Remarks,' and the city clerk is hereby instructed forthwith to enter said amounts in column headed 'The amounts assessed as confirmed by council.' The resolution was adopted by the following vote."

The city clerk having complied with the instructions, the assessment roll was confirmed "as corrected." When the council took up the consideration of the assessment roll as signed by the entire board of assessors it is clear

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that the amounts assessed therein were those set down by Mr. Moe in the first instance, and it is equally clear that the council changed the assessment of every parcel of land to correspond with the pencil memoranda. In doing this we think the council exceeded its powers. The only power granted to the council to itself alter the roll in anywise is by way of correcting it "as to any assessment or description of premises appearing therein." A revision of the roll or a new roll must be made by the board of assessors. The provisions as to the revision and annullment of the roll imply that the corrections to be made by the common council are less extensive and relate to corrections of mathematical errors in computing amounts or errors in the description of property. In view of our conclusion, it becomes unnecessary to consider the other interesting questions discussed in the briefs of counsel.

The decree is reversed, and a decree may be entered quashing the proceedings as to complainants, with costs to complainants.

MCALVAY, STONE, OSTRANDER, and BIRD, JJ., concurred.

In re DOUGHERTY'S ESTATE.

1. WILLS—ATTESTATION—WITNESSES.
   It is a sufficient attestation of a holographic will, that the witnesses signed the instrument at the request of testator in his presence, after his declaration that it was his will, though without seeing his signature.

2. SAME—EVIDENCE—PRESUMPTIONS—EXECUTION.
   From the fact that the will was written by testator, was signed when found, was in testator's desk in an envelope ad-

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dressed in his writing, from the fact that he requested the witnesses to sign it and acknowledged it as his will, being in his right mind, etc., a presumption arose that he had signed the testament before the witnesses subscribed their names.

8. SAME—DIRECTING VERDICT—EXECUTION.

The court properly submitted to the jury the question whether the will was signed by testator at the time he asked the witnesses to attest it.

Error to Ionia; Sessions, J., presiding. Submitted November 15, 1911. (Docket No. 121.) Decided January 23, 1912.

Lois J. Dougherty presented for probate an instrument purporting to be the will of John R. Dougherty, deceased. It was admitted to probate by the probate court, and Hiram Crandall and other contestants appealed to the circuit court. Judgment for proponent, and contestants bring error. Affirmed.

Locke & Sheldon and *R. A. Hawley*, for appellants.

Scully & Davis, for appellees.

STONE, J. This case originated in the probate court of Ionia county, in the matter of the probate of the last will and testament of John R. Dougherty, deceased.

John R. Dougherty died June 1, 1910, at the age of 67 years. On June 6, 1910, his widow, Lois J. Dougherty, petitioned for the admission to probate of a paper in writing as his last will and testament. This paper writing consisted of two similar sheets of ruled paper, one side only of which sheets was written on. With the exception of the names of the witnesses, all of the writing upon the paper was in the handwriting of John R. Dougherty. This writing was found by Mrs. Dougherty on the Monday following his death in a drawer in what had been his desk. The drawer in which it was found was not locked. It was inclosed in an unsealed envelope, worn upon the edges, and addressed: "Mrs. Lois J. Dougherty, Lyons,

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Michigan. Not to be opened until my death. John R. Dougherty." Mr. Dougherty had never told his wife that he had made a will, and she had never seen the envelope or its contents until after his death. The handwriting of the directions upon the envelope was that of John R. Dougherty.

The probate court admitted the paper to probate as the last will and testament of John R. Dougherty. An appeal was taken by contestants to the circuit court, resulting in a verdict of the jury that the instrument in question was the last will and testament of John R. Dougherty. In this paper, the attestation clause followed the substance of the will, without signature or space for signature between. The signature of John R. Dougherty appeared near the bottom of the last sheet of the paper, after the attestation clause, and to the right and slightly above the signatures of the witnesses. The contestants are the nephews and nieces and one sister of the deceased.

Objection was made to the probate of the will, on the ground that the will was not properly executed, and in accordance with the statute. At the trial the witnesses to the will, Howard A. Ranger and Walter H. Ranger, were sworn, and also Mrs. Dougherty. The contestants offered no proof, and, when proponents closed their evidence, moved the court to direct a verdict in favor of contestants, on the ground that the evidence did not show the will to have been properly executed in accordance with the terms of the statute. This motion was overruled, and the court submitted to the jury the question whether Mr. Dougherty had signed the paper purporting to be his last will and testament at the time he requested the witnesses to sign as such.

There is no material difference in the testimony of the two subscribing witnesses as to what was said and done at the time they wrote their names upon the paper. The witnesses were old acquaintances of Mr. Dougherty. They testify, in substance, that on March 18, 1902, Mr.

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Dougherty came into their store (they being together in the back part of the store), and said:

"I have made my will. I have drawn it myself. I want you to witness it, and [with an oath] I want you to see I am in my right mind."

No other words were spoken by Mr. Dougherty while he was there. He placed the paper upon the desk, either rolled or folded, so that no writing whatever was seen, and he showed them where to sign their names. The witnesses were examined and cross-examined at great length as to the appearance of the paper, and as to other writing being in view when they signed as witnesses.

The substance of their testimony is that they saw no signature or writing. They describe the way in which the paper was folded or rolled, and testify that, had there been any writing in sight, it was their judgment that they would have seen it. When the paper was produced and offered in evidence, the word "witnesses" appeared below the signatures of the witnesses, and near the bottom edge of the paper. The witnesses were unable to testify whether or not that word was there when they signed, they both testify that they did not see or notice it, but that it might have been covered by their hands in signing; and the same is true as to a bracket at the right of the signatures of the witnesses. Counsel in their statement of facts have set forth many other things that were not said and done, but the foregoing is the substance of what was said and done as testified to by the subscribing witnesses, both of whom are positive as to the genuineness of their own signatures, and that the entire remainder of the paper as produced was in the handwriting of John R. Dougherty, deceased. It does distinctly appear that the attestation clause was not read or shown to either of the witnesses.

The charge of the court is sufficiently set forth in the assignments of error. The first two assignments of error are to the effect that the court erred in overruling contestants' motion to direct a verdict that said instrument was

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not the last will and testament of John R. Dougherty, deceased, and in not directing such verdict. The third assignment of error is that the court erred in instructing the jury as follows:

"It is sufficient to say to you that the requirements of the law in this instance have been complied with and have been satisfied, if John R. Dougherty had signed this instrument at the time he presented it to the witnesses, the Rangers, and requested them to sign it as witnesses."

The fourth assignment of error is to the effect that the court erred in instructing the jury as follows:

"So that is a question for you to determine. At the time that John R. Dougherty presented this instrument in question to Howard and Walter Ranger, and requested them to witness it, had he [John R. Dougherty] then signed it? Was his signature affixed to the instrument at the time? If it was, this is a valid will."

The fifth assignment of error is to the effect that the court erred in instructing the jury as follows:

"It does not make any difference whether the witnesses Ranger saw the signature or not. If, in fact, the signature, at the time they signed the will, was affixed to the instrument, it is a valid will, and it is the last will and testament of John R. Dougherty. If the signature of John R. Dougherty was not affixed to the instrument at that time, it is not a valid will, and it is not the last will and testament of John R. Dougherty."

The sixth assignment of error is that the court erred in instructing the jury as follows:

"The fact that this instrument is in the handwriting of John R. Dougherty, and that his signature is affixed thereto, and the further fact that he presented these papers to the witnesses Ranger, and informed them that he had drawn his will, made his will, and requested them to witness it, raises a presumption that his signature was affixed to that instrument before the witnesses signed their names to the instrument. That presumption is not conclusive, and it may be rebutted, may be overcome, by other proof in the case. In determining that question, it will be your duty to take into consideration that pre-

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sumption, which is a presumption of law, and also to take into consideration the other facts that have been testified to as occurring upon that occasion."

Error is claimed in the seventh assignment that the court erred in instructing the jury as follows:

"If you find from the evidence in the case that John R. Dougherty's signature was affixed to this instrument before the instrument was presented by him to the witnesses Ranger for their signature, it will be your duty to find for the proponents."

1. Considering the first and second assignments of error together, contestants claim that the proof did not establish the execution of the paper as a will, and reference is made to our statute. It is urged that the evidence did not show any execution of the paper, as the witnesses did not see Mr. Dougherty's signature; that he did not say he had signed it, and he did not sign it in their presence. It is claimed that he did not in any manner indicate that he had signed the paper, and, this being true, these witnesses did not attest the execution of the paper. Counsel upon both sides agree that the paper could not be a valid will unless it was in fact signed by the testator at the time it was presented to the witnesses for their signatures.

Is the fact that this was a holographic will or paper of any importance here? We cannot undertake to review the numerous authorities cited by counsel in their exhaustive briefs.

In the recent case of *In re Horn's Estate*, 161 Mich. 20, our statute and the English statutes, relating to wills, are referred to and commented upon. In Schouler on Wills (3d Ed.), § 319, that author, after referring to the English statutes, being the modern wills act (1 Vict. chap. 36, § 9), and the statute of frauds (29 Car. II, chap. 3), says:

"A comparison of the language used in these two great enactments will show various important points of difference between them. * * * In the several American States will be found local statutes with corresponding

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differences of detail, so that no single principle can be laid down to embrace the entire doctrine. * * * In some States, as under the old statute of frauds, they are to 'attest and subscribe' the will, and nothing is said about requiring a testator to 'make or acknowledge' the will in their presence; nor do all States insist that all the witnesses shall attest and subscribe in the presence of one another, but merely in the presence of the testator, another feature copied from the earlier English enactment. In fact, our American wills acts appear based in expression less upon the act of Victoria than that of Charles II; yet they vary quite as widely in details as do these English enactments, and the latest tendency conforms more to the statute of Victoria, or that of the New York code, which is somewhat similar."

Section 330:

"Statutes which relate to the duty of subscribing wills couple usually the words 'attest' and 'subscribe;' and these words should be distinguished. 'To attest the publication of a paper as a last will,' observed Robertson, C. J., of Kentucky, in 1840, 'and to subscribe to that paper the names of the witnesses, are very different things, and are required for obviously distinct and different ends. Attestation is the act of the senses; subscription is the act of the hand; the one is mental, the other mechanical; and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication; but to subscribe a paper published as a will, is only to write on the same paper the names of the witnesses for the sole purpose of identification. There may be a perfect attestation in fact without subscription.' We have seen that a legal publication is now usually dispensed with, except that the testator must either sign in the presence of the subscribing witnesses, or make due acknowledgment instead; but in knowing and certifying whatever is thus made requisite consists still the attestation of the witness as distinguished from the manual act of putting his name to the paper. By attestation we signify the act of witnessing in its full legal import; by subscription, the signing of one's name, which implies that this act has been performed."

Section 321:

"Next, we consider the signing or acknowledging of the

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will before the witnesses. Upon this point is found a difference of statute expression, and hence of statute construction, which is of especial consequence where the testator signs his will, and then seeks out witnesses afterwards. The old statute of frauds required witnesses to attest and subscribe the will; which was interpreted to mean that the testator was not obliged to sign in the presence of the witnesses, provided he made before them a due acknowledgment of the instrument; and, furthermore, that a due acknowledgment in fact did not necessitate the acknowledging in words that the instrument was his will, nor apprising the witnesses in any way of the nature or contents of the instrument they were called upon to attest. A testator's declaration before three witnesses that the instrument produced and already signed by him was his will, was equivalent to signing it before them. And more than this, though he merely asked the witnesses to sign, as such, the paper he produced which bore his signature, and they did so, neither seeing his signature nor knowing what was the nature of the instrument thus attested, the statute nevertheless was satisfied; supposing, of course, that this whole transaction imparted consistently the full testamentary intent on his part."

Section 322:

"It is possible that the testator's signature was on the will, where the witnesses might have seen it, but inadvertently did not; it is possible, too, that the precise circumstances of attestation may have faded from the recollection of a witness by the time the will is presented for probate. Where all appears regular on the face of the will, a due attestation should be presumed; and direct evidence that the name of the testator was visible on the face of the will when it was produced for witnesses to sign is certainly not necessary. The result of the cases under the statute of Victoria, where acknowledging and not signing in person is relied upon, or, in other words, that the testator's signature was already upon the will when it was produced to the witnesses for their attestation, appears to be this: That, in the absence of direct evidence on the point one way or the other, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from these circumstances, and from the appearance of the document itself, whether the name of the testator was

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or was not upon it (or rather might not have been seen), at the time of the attestation."

In 1 Jarman on Wills (5th Ed.), p. 212, that author, referring to the case of *Gryle* v. *Gryle*, 2 Atk. 176, says:

"Lord Hardwicke doubted whether it was enough for the testator to say before the witness, 'This is my will,' without a resealing, or unless the testator had declared it to be his handwriting; but the doubt appears to have vanished in *Ellis* v. *Smith*, 1 Ves. Jr. 11, where the question is stated in general terms to be, whether a testator's declaration before three witnesses, that it is his will, was equivalent to signing; and the conclusion, therefore, of the judges who decided that case in favor of the validity of the will, amounted to an affirmation of the sufficiency of such a declaration.

"Later adjudications placed the point beyond all doubt by going much farther; these cases having decided that where a testator, who had previously signed his will, merely requested the witnesses to subscribe the memorandum of attestation, though they neither saw his signature, nor were made acquainted with the nature of the instrument they attested, the will, nevertheless, was duly executed according to the statute. 'When we find,' said Tindal, C. J., in *British Museum* v. *White*, 3 M. & Payne, 689, 6 Bing. 310, 'the testator knew this instrument to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge in fact, though not in words, to the three witnesses that the will was his'"—citing *Roberts* v. *Welch*, 46 Vt. 164.

An examination of *White* v. *British Museum*, *supra*, will show that the witnesses did not see the signature of the testator upon the paper, and did not know whether it was there at the time they signed it.

Following these authorities, the Supreme Judicial Court of Massachusetts, in *Ela* v. *Edwards*, 16 Gray (Mass.), 91, decided in 1860, passed upon a state of facts somewhat similar to the instant case. The following proof was offered of the execution of a will entirely in the hand-

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writing of the testatrix and signed by her, to which three other persons had signed their names in the usual place for the signatures of witnesses, but without any attestation clause. The person whose name came first testified as follows:

"She passed me a package of papers; asked me to sign my name as a witness; told me where to sign, on the left side."

The person whose name was last testified:

"She said she wanted me to witness a document; that she had been making a little disposition of her effects, and would like to have me sign it as a witness. She put her finger to the line where she wished me to sign."

It appeared that the person whose name was signed between the names of those two was out of the jurisdiction of the court, but had resided in the immediate neighborhood of the testatrix at the time when the will purported to have been executed, and it was also proved that the signature was genuine. Held, that this was sufficient proof, in the absence of any evidence of fraud, of an execution of the will in conformity with the requirements of the statute.

Justice Dewey, at page 93 of 16 Gray (Mass.), says:

"But the case of *Hogan* v. *Grosvenor*, 10 Metc. 56 [43 Am. Dec. 414], in reference to one of the attesting witnesses to that will, is so exceedingly like the present in regard to the question of attestation by two of the witnesses to the present will, that it is proper to refer to it more particularly. In that, as in the present case, the will was in the handwriting of the testator. The testator there took the paper from his desk, asked the witness to sign it, and pointed out the place where he wished him to put his name. The witness did so, not knowing what the paper was, and not noticing the signature of the testator on the paper. This was held a good attestation of the will. * * * As was said by the court, in *Dewey* v. *Dewey*, 1 Metc. 354 [35 Am. Dec. 367]:

"'It can hardly be supposed that the testator, who was by his own active agency procuring the authentication of the instrument

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by the requisite witnesses, would have omitted the first steps necessary to its due execution, viz., the signature by himself.'"

We cannot, without prolixity, further quote from this leading case.

In Rood on Wills, at section 272, that author says, after referring to the statute of frauds:

"Remembering that nothing is necessary beyond what the statutes require, except testamentary capacity and intention, it is pertinent to ask what is necessary, by reason of the requirement that the will be attested. Evidently 'attest' and 'subscribe' were used by the lawmakers to indicate different things. Both are required of witnesses. 'Attest' ordinarily means to bear witness; to take notice. * * * To attest as a witness to a will is therefore to observe, perceive, discern, and take notice of what is done in executing the will. The witness subscribes with his hand; he attests with his eyes and ears."

Section 280:

"Lastly, it was settled that attestation under the statute of frauds did not require the witnesses to see the testator's signature on the will, nor know that it had been signed by him. [Referring to the English cases already cited.] Wherever the statute does not require witnesses to attest the signature, but only to attest the will, their attention need not be called to the signature. [Citing cases.] It is no objection that the testator so concealed the signature that the witnesses could not see it. [Citing *Gould* v. *Theological Seminary*, 189 Ill. 282 (59 N. E. 536.)] But if it was not in fact signed, there was no will to attest."

The author cites in a note the case holding the contrary doctrine—*Tobin* v. *Haack*, 79 Minn. 101 (81 N. W. 758), referred to and quoted from by contestants.

At section 282, the same author says:

"It may be admitted that if witnesses subscribe as such at the request of the testator, express or implied, there is a sufficient attestation without anything more; but this is only because the express or implied request by the testator to them to so subscribe necessarily includes in itself an admission to them that the instrument is his, and accepted and approved. Therefore, attesting a will under

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the statute of frauds, and under the statutes of most of the States, consists of learning from the testator in some way that the particular writing witnessed is finally approved by him"—citing *In re Claflin*, 75 Vt. 19 (52 Atl. 1053, 58 L. R. A. 261); *In re Kohley*, 200 Ill. 189 (65 N. E. 699).

See, also, section 283, and cases cited. We refer to, as supporting this doctrine, *Gould* v. *Theological Seminary*, *supra*; *Hobart* v. *Hobart*, 154 Ill. 618, 619 (39 N. E. 581, 45 Am. St. Rep. 151). We cannot quote from these cases at length.

Counsel for contestants cite the case of *Luper* v. *Werts*, 19 Or. 122 (23 Pac. 850), in support of their position. A careful reading of this opinion will disclose that in its facts it is not controlling of the instant case. In the opinion, this language is used:

"If it appeared from the evidence bearing upon the point involved that the decedent acknowledged or adopted the signature to the instrument as his own, in the presence of the witness Peyser, either from the testimony of the latter or from that of any other witness, or that, by any sign, motion, conduct, or attending circumstance, he gave said witness to understand that he had already subscribed the instrument, I should not hesitate to hold, as I am at present advised, that it was a sufficient acknowledgment; but I fail to discover any evidence which would warrant such a conclusion. The evidence shows that the decedent, while the said witness was subscribing his name to the instrument, maintained 'mere silence,' which is not enough. *Haynes* v. *Haynes*, *supra* [33 Ohio St. 598, 31 Am. Rep. 579]. If the decedent had said to the witness Peyser, 'This is my will,' or if the witness Beard had said, in the presence of the decedent and Peyser: 'This is the will of Mr. Werts; he has signed it, and wants you to subscribe you name to it as a witness'—or used any language of that import, the contention of the proponent's counsel might have been tenable."

In our opinion, the trial judge did not err in declining to direct a verdict for the contestants.

2. The remaining assignments of error are argued together by contestants, and they claim that from the testi-

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mony there was no presumption that decedent had signed the will; that if such presumption could be said to have arisen it was rebutted; and that the attestation clause raised no presumption, for the will was not signed when it was written. If contestants mean by this last claim that the will was not signed on the occasion of the writing of the attestation clause, we would say that the claim is mere assumption. We think that the fact that this was a holographic will is of some importance. The presumption that it was signed when written is, we think, greater than would have been the case, had the will been prepared by another person, as a mere unfinished paper. The jury saw the paper. It is claimed by proponents that it bore intrinsic evidence of having been written and signed with the same pen and ink, and at the same time. These were matters for the jury. In aid of the presumption that the will was signed when presented to the witnesses, are the following facts: It was signed when found. It was found in the drawer of testator's desk, in an envelope bearing directions in the handwriting of testator. The entire will is in his handwriting, including the attestation clause. His own declaration that he had made his will. He had drawn it himself. He wanted the witnesses to witness it. He was in his right mind. He produced it from his own custody. He would not be presumed to perform an idle act. He was unattended and competent and rational. He was at the time giving his business matters attention. The paper was folded. The space he pointed out where he asked the witnesses to sign was small. The manner of folding the paper was such that one sheet covered the other, except the space where the witnesses signed, so that no signature of testator was seen upon the paper. The witnesses could not swear that the signature was not upon the paper. There was no fraud claimed in the transaction.

Will the facts that the witnesses did not see the testator sign his name, and did not see his name on the paper, and that he did not expressly say to them that he had signed

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it, as matter of law, overcome the presumption that it was signed when presented to the witnesses, under the circumstances? We think not.

We find no error in the charge of the court. We find nothing in the decisions of this court, cited by counsel, which is in conflict with the conclusion we have reached.

The judgment of the circuit court is affirmed.

McALVAY, BLAIR, OSTRANDER, and BIRD, JJ., concurred.

RILEY *v.* ROACH.

1. MASTER AND SERVANT — AUTOMOBILES — PERSONAL INJURIES — NEGLIGENCE.

   For negligent injuries caused by defendant's chauffeur, who was directed by his employer not to take the automobile out while he was away from home unless directed by his wife, but who disobeyed instructions and took the car out with several guests that were staying at the house, defendant was not liable, under a declaration charging that the chauffeur acted with the knowledge and consent of defendant.[1]

2. EVIDENCE—HEARSAY—RES GESTÆ—MASTER AND SERVANT.

   Statements made by defendant's chauffeur, while he was disobeying defendant's instructions, and was not engaged in the business of his employer, were hearsay and inadmissible.

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[1] It will be noted that the injury complained of occurred before the "motor vehicle law" (Act No. 318, Pub. Acts 1909) went into effect.—REPORTER.

Liability of owner of automobile for injuries caused thereby while being used by a servant or a third person for his business or pleasure, see notes in 9 L. R. A. (N. S.) 1033; 14 L. R. A. (N. S.) 216; 21 L. R. A. (N. S.) 93; 26 L. R. A. (N. S.) 882.

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Error to Oceana; Sessions, J. Submitted November 15, 1911. (Docket No. 127.) Decided January 23, 1912.

Case by Luke Riley against William Roach for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Cross, Vanderwerp, Foote & Ross and *V. V. Barnes*, for appellant.

Rufus F. Skeels, Fred J. Russell, C. O. Smedley, and *F. E. Wetmore*, for appellee.

STONE, J. This is an action on the case to recover damages for an injury received by the plaintiff on July 28, 1909, by reason of an alleged collision of defendant's automobile with the plaintiff's buggy, in which he was riding on a highway.

The declaration consists of two counts. In the first count the plaintiff alleges as follows:

"And which automobile of said defendant was then and there under the care, direction, and supervision of a certain then servant, to wit, one Hall, a chauffeur, of the said defendant, who was then and there driving the same in and along the highways in said county and State by the *order*, *direction* and *knowledge* of said defendant, and in the *prosecution of his business aforesaid.*"

In the second count it is alleged:

"And which automobile of said defendant was then and there under the care, direction, and supervision of a certain then servant, to wit, one Hall, a chauffeur, of the said defendant, who was then and there driving the same along the highways in said county of Oceana *with the consent of said defendant.*"

Upon the trial the following undisputed facts were shown: The defendant was the owner of a valuable automobile, which he bought the season before the accident. The defendant was called by the plaintiff for cross-examination under the statute. After testifying that the

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chauffeur, Hall, had been in his employ nine days when the accident occurred, the following was his testimony:

"*Q.* Did you engage Mr. Hall to do any work, other than to operate your automobile?

"*A.* No, sir; I did not. Operate and keep it clean, keep it in repair, you understand—the general work of a chauffeur. He came to me well recommended. I was in the Upper Peninsula of Michigan on July 28, 1909. I left Hart the night of Sunday, July 25, 1909. I know a Mrs. Blake who resides in Albion. I don't know her given name. She is in no way related to me or to my wife. She was not in Hart when I left for the Upper Peninsula. I understood that she was at my place while I was gone.

"*Q.* As a guest?

"*A.* Well, she was there, and my wife was away from home, Mrs. Roach and I was away from home, and she was gone when I got back, and I understand she came to visit Mrs. Nott.

"*Q.* Who is Mrs. Nott?

"*A.* Mrs. Nott is my brother-in-law's wife, Mr. Nott, who was an Albion lady before her marriage.

"*Q.* Where was she living at that time?

"*A.* She was living in the village of Hart.

"*Q.* Occupying your residence?

"*A.* Oh, no.

"*Q.* Did your wife accompany you on your trip to the Upper Peninsula?

"*A.* No, sir.

"*Q.* Did you leave anybody in charge of your house while you were gone?

"*A.* We did.

"*Q.* Who?

"*A.* Miss Harriett Nott.

"*Q.* That is not the Mrs. Nott that you speak of?

"*A.* No, no. This is a 'Miss;' I didn't say 'Mrs.'

"*Q.* Who is Miss Harriett Nott?

"*A.* My wife's sister.

"*Q.* She was given general charge of the house, was she, while you were gone?

"*A.* She was; yes, sir.

"*Q.* When did your wife leave Hart?

"*A.* Some two or three weeks before.

"*Q.* That is before you left?

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"*A.* Before I left; yes, sir. I can't just tell you the exact date, some two or three weeks.

"*Q.* I am not particular about that. But you were both gone?

"*A.* Yes, sir.

"*Q.* And you left your residence in charge of Miss Harriett Nott, and were there any guests at your house at the time you left?

"*A.* I think my wife's sister was visiting between Mr. B. C. Nott's and my wife's house, our home.

"*Q.* What is your wife's sister's name?

"*A.* Mrs. Royce.

"*Q.* Is that Mrs. Carrie Adelle, or Adellia, do you pronounce it, Royce?

"*A.* That is the lady.

"*Q.* Any other guests there?

"*A.* Not that I remember of. We had guests coming and going all the time; men coming to see me on business that I always entertained at my home.

"*Q.* Your wife's sister was not there in the same capacity as men who drop in to see you on business, and that you entertain, was she?

"*A.* No, sir. She was there spending her summer. She came to Hart to spend her summer vacation. She was spending it between our home and Mr. Nott's home.

"*Q.* I suppose you did the best you could to entertain her, didn't you?

"*A.* Why, we didn't—she entertained herself.

"*Q.* You furnished an automobile for her use, if she desired it, didn't you?

"*A.* No, sir.

"*Q.* Never?

"*A.* No, sir.

"*Q.* Up to the time you left, hadn't she ridden in your automobile?

"*A.* No, sir.

"*Q.* Why was that?

"*A.* Well, one reason was that we hadn't a chauffeur for some considerable time; hadn't had anybody to drive the car. I don't know how to drive a car myself, and the time she come to visit us, up to the time that Mr. Hall came, we hadn't had anybody to drive the car.

"*Q.* You made quick use of him when you got him, didn't you?

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"*A.* Why, no. I didn't make particularly quick use of him.

"*Q.* What use did you make of that automobile after Mr. Leslie Hall came there?

"*A.* My instructions to Mr. Hall—

"*Q.* (Interrupting) I am not asking you about your instructions. Read the question.

"*A.* I think I had it out twice.

"*Q.* Who had it?

"*A.* Leslie Hall and I.

"*Q.* Now, your purpose in getting Leslie Hall there as chauffeur just before your departure was for the purpose of having somebody to operate that automobile for the benefit of anybody that might want to use it there at the house, didn't you?

"*A.* Oh, no; I beg your pardon.

"*Q.* Nothing of that sort?

"*A.* Nothing of that sort.

"*Q.* For what purpose then?

"*A.* Please state your question again.

"*Q.* The stenographer will read it. (Last question read.)

"*A.* No, sir. My purpose of employing Leslie Hall was for the purpose of operating my automobile at such times as myself and my wife might want it.

"*Q.* You mean by that, that you didn't expect he would take one of your guests in your automobile—your wife's sister?

"*A.* I meant by that I do not take my automobile out without myself or Mrs. Roach goes with it.

"*Q.* Has that always been true?

"*A.* Up to that time; yes, sir.

"*Q.* How has it been since that time?

"*Mr. Smedley:* I object to that as incompetent.

"*Mr. Wetmore:* And immaterial.

"*The Court:* I think you may answer.

"*A.* Practically the same.

"*Q.* What did you use your automobile for?

"*A.* I use my automobile for the pleasure of myself and wife and invited friends, when we take them to ride with us.

"*Q.* For any purpose connected with the factory?

"*A.* I have used my automobile when I wanted to for my own individual use, whether it was for the factory, or whether it was my personal use. If I was going—it became necessary for me to go to Shelby or Muskegon, the

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automobile is my individual property; and if I chose to ride in the automobile, rather than to go in the train, I did as I thought best about the matter.

"*Q.* In whose charge did you leave this automobile when you left for the North?

"*A.* I left it in Leslie Hall's charge, if anybody's.

"*Q.* There isn't any question about it, is there, but what you left it in his charge.

"*A.* I left it in his charge to do certain things with it. His instructions were complete.

"*Q.* How soon did you return after July 28th?

"*A.* I got back to Hart some time after 5 o'clock on the following Thursday. That would be the day following the accident.

"*Q.* To what use did Mr. Hall put your automobile while you were away, other than taking the trip on the occasion that Mr. Riley was injured.

"*A.* I wired—I called up by telephone—to have Leslie Hall take my automobile and come to Ludington, and meet me at Ludington.

"*Q.* When did you do that?

"*A.* On the morning of the 29th. I was gone from home Monday, Tuesday, Wednesday, and almost all Thursday. I left Sunday night on the evening train for Chicago.

"*Q.* What was done with that automobile on Monday and Tuesday, or either of those days?

"*A.* To my best knowledge, there wasn't anything done with it.

"*Q.* You happen to know about the use on Wednesday because of this accident, do you?

"*A.* Yes, sir. I first learned of what had occurred after the Hart plant had shut down on Thursday; it was 8 or 9 or 10 o'clock, or possibly 11 o'clock. I got the word when I was driving between here and Pentwater with Mr. Daggett, who is one of our stockholders, associated with me in business and an officer of the company at the present time; he told me about it. He wasn't an officer in the company at that time.

"*Q.* How were you paying Mr. Leslie Hall?

"*A.* Paying him by the week.

"*Q.* Did you pay him for the week that this accident occurred?

"*A.* Yes, sir.

"*Q.* Continued him in your employ?

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"*A.* Yes, sir.
"*Q.* He is now in your employ?
"*A.* Yes, sir.
"*Q.* In the same capacity?
"*A.* Yes, sir."

Examination by Mr. Smedley:

"Just before I employed Leslie Hall as my chauffeur, my machine was out of commission.

"*Q.* And what did you have to do in order to fix it so that it would run?

"*A.* Well, now, I am not very familiar with automobile terms; I don't run a car myself, because I am too busy a man. There was two little bearings in the hind axle, or in the hind mechanism, that we needed to get before we could run the car, because the bearings in that were worn out, or become deficient. I ordered those bearings, and they came, but they were the wrong size. I ordered them again, and they came, and they were the wrong size again, and I ordered them again, and they were the wrong size, and then I gathered up the old bearings and sent them down to Chicopee Falls, Mass., and got the right bearings. The correspondence in my office will show that it was their fault and not mine.

"*Q.* Was this after you employed Mr. Hall?

"*A.* This was previous to my employing Mr. Hall.

"*Q.* What, if any, work did he do in the machine?

"*A.* He put those bearings in, and went over the car in a general way; went over it all through, took the rear axle down—I am not familiar with automobile terms.

"*Q.* After he got it fixed, did you use it before you went to the Upper Peninsula?

"*A.* I did, I think, twice; Leslie Hall was with me. Those trips were to test the machine and see if it was in running order. Before I went away, I gave him some instructions. My instructions to him were to go all over the car, be as careful as he could with it, see that the machinery was all in working order, scour up the brass, brush out the top, clean it all up in good shape, and not take it out until my return, unless Mrs. Roach or I called for it. Mrs. Roach at that time was ill over to Mr. White's cottage on the beach, under a doctor's care. I think that beach is called Oceana Beach. It is eight miles from Hart by road. Mrs. Roach had been there probably three weeks before I employed Mr. Hall. She was still

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out there in the cottage when I got back. She was very nervous, and I think the doctor called it nervous prostration.

"Q. Did she use the automobile during that time that you were away?

"A. Oh, no; the automobile was out of commission.

"Q. It was in commission before you went away?

"A. In commission before I went away; yes, sir.

"Q. While you were gone to the Upper Peninsula, did your wife use that?

"A. No, sir.

"Q. Who was staying with her out there to the beach?

"A. Mrs. Daggett at that time, and a girl.

"Q. Were those two women alone?

"A. With the exception of one young girl.

"Q. Who, if anybody, went out there nights to stay?

"A. Well, during her sojourn there, I either went out, or Mr. Daggett, or sometimes my brother-in-law, Mr. Nott, went out, if I had to be away from home.

"Q. How did they go and come.

"A. Sometimes we took Mr. Daggett's car; sometimes we drove with a horse.

"Q. And when you went to the Upper Peninsula at this particular time, who went out there nights to stay?

"A. Well, either Mr. Daggett or Mr. Nott was to go out there; they promised me faithfully when I went away that one of them would go every night, and I think it was Mr. Daggett went.

"Q. Do you know who was out there Tuesday night?

"A. No, sir.

"Q. Do you know what business this man Hall was on at the time he took out your car?

"A. Yes, sir.

"Q. Did you or your wife give him any orders to take that machine out?

"A. We did not.

"Q. When he took it out, was it without your knowledge and without your consent?

"A. It was.

"Q. And contrary to your instructions?

"A. Yes, sir.

"Q. How long had he been in your employ when you gave him these instructions not to take the car out—clean it up, but not to take it out until you got back, unless your wife instructed him to?

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"*A.* Well, he came Monday on the train, and I think we got there—well, I can't say just when it did get here; it got here some time in the forenoon, and that was the following Saturday night.

"*Q.* And he had worked for you only five days?

"*A.* That is the time; yes, sir.

"*Q.* Now, why was it that you told him to clean it up, but not to take the car out until you got back unless your wife told him to?

"*A.* Well, sir, from the fact that I had just gotten the young man, and from the fact that the car had been needing some repairs, and from the fact that it was good business, as any other good business man would do.

"*Q.* How expensive a machine was that?

"*A.* Thirty-five hundred dollars, besides about $300 of extra repairs, fixtures, extra fixtures that always go to the car—appurtenances that goes onto the car.

"*Q.* What was the total cost of the machine to you?

"*A.* About $3,800. The car was a first-class equipped car."

Recross-examination by Mr. Cross:

"*Q.* Your wife was stopping where, you say, at this time?

"*A.* She was living over to Mr. White's cottage on the beach.

"*Q.* How far from Hart?

"*A.* Why, it is eight miles; it is considered eight miles to Pentwater, and I guess, perhaps, it is a half or three-quarters of a mile over to the cottages. I couldn't say just exactly; possibly more, possibly not so much.

"*Q.* Telephone communication between that cottage and your home?

"*A.* No, sir; no telephone."

Pursuant to the promise which had been made to defendant, Mr. Daggett, on the evening of July 27, 1909, in company with defendant's sister-in-law, Miss Nott, who had charge of the Roach house, and one Carl Flood, went in Mr. Daggett's automobile to the cottage at Oceana Beach, occupied by Mrs. Roach and Mrs. Daggett. While making the return trip to Hart, the following morning, their supply of gasoline became exhausted, and left them stranded or "stalled" 3½ miles north of Hart.

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Mr. Flood and Miss Nott were with Mr. Daggett. Mr. Flood was not a witness. As to what was done at this point appears by the testimony of Mr. Daggett, as follows:

"*Q.* Now, when you exhausted your supply of gasoline, what did you do to replenish it?

"*A.* Why, we were right by Mr. Cox's barn, and Mr. Flood was with me, and I says, 'Well?' He says, 'We will see whether Mr. Cox has any or not.' We met Mr. Cox at the barn; asked him if he had any gasoline. He said: 'No; but Mike might have some at the Corner.' And Mr. Flood said: 'Well, we can get gasoline from Hart about as quick as we could get it from the Corner, a little over a half a mile away.' 'Well,' I says, 'all right, then; you go and call Dikeman and have him bring us out some.'

"*Q.* Where was Miss Nott during this time?

"*A.* She was way back in the road, in the car.

"*Q.* Who is Dikeman?

"*A.* Why, he is the man that does repairing here; he repaired my car several times.

"*Q.* Who telephoned in?

"*A.* Mr. Flood.

"*Q.* Do you know to whom he telephoned?

"*A.* I don't, sir; I was not in the house.

"*Q.* Who came with the gasoline?

"*A.* Why, Mr. Hall, Mr. Roach's chauffeur.

"*Q.* Whose automobile did he have?

"*A.* Mr. Roach's automobile.

"*Q.* And who accompanied him on this trip out?

"*A.* The two ladies and a gentleman, Mrs. Royce, and the other two parties I had never seen before.

"*Q.* There was Mr. Hall and Mrs. Royce?

"*A.* Mrs. Royce and the other two parties I had never seen before.

"*Q.* Mrs. Royce is a sister of Mrs. Roach?

"*A.* Mrs. Roach's sister; yes.

"*Q.* Was visiting there at the time?

"*A.* Yes.

"*Q.* And there was another lady and gentleman?

"*A.* Yes.

"*Q.* That you were not acquainted with?

"*A.* Not acquainted with at the time.

"*Q.* Did you make their acquaintance, so that you can tell us who they were?

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"*A.* Yes; I was introduced to them.
"*Q.* Who were they?
"*A.* Mrs. Blake and her son.
"*Q.* Do you know where they were visiting in Hart?
"*A.* No; I don't."

Mr. Blake, whose deposition was taken, testified that he and his mother, in company with Mrs. Royce, with Hall as chauffeur, in response to a telephone message, left Hart with defendant's automobile to take a can of gasoline to Mr. Daggett. The gasoline was furnished in this manner, and after replenishing his car Mr. Daggett, with Miss Nott and Mr. Flood, proceeded on their way to Hart. The chauffeur continued on in the opposite direction until he found a suitable place in which to turn around, which he did, and it was while returning to Hart that the collision occurred which is the subject-matter of this suit.

At the conclusion of plaintiff's evidence, the trial court directed a verdict for the defendant, on the ground that the plaintiff had not made a case. In other words, the court held that at the time of the accident the chauffeur was not acting within the scope of his employment by defendant, but contrary to his directions, and was in fact performing a service for Mr. Daggett, and that the evidence did not warrant a submission of the case to the jury.

Verdict and judgment were entered for the defendant, and, after a motion for a new trial was denied, the plaintiff brought the case here upon writ of error, assigning as error that the trial court erred in directing a verdict for the defendant, and in refusing a new trial.

It is urged by appellant that it was not for the court to say, under all the evidence, that defendant's chauffeur was not acting within the scope of his employment; and that the presumption arising from the attendant facts and circumstances was not so completely overcome by the testimony of the defendant as to warrant the court in determining this question.

The appellant relies largely upon the case of *Moon* v.

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Matthews, 227 Pa. 488 (76 Atl. 219, 29 L. R. A. [N. S.] 856, 136 Am. St. Rep. 902). Counsel quote at length from this case, and claim that it is in its facts almost identical with the instant case. The headnote of that case is to the effect that the mere fact that a chauffeur, in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of the family, disobeys the master's command not to take out the car, unless the master accompanies it, does not show that he is acting outside the scope of his employment, so as to relieve the master from liability for injury done by the negligent handling of the car.

That case also holds that the facts and circumstances at the time of an accident may raise a presumption that the regular chauffeur employed by the owner, and in charge, was acting within the scope of his employment. In that case it appeared that the owner had forbidden the chauffeur to take out the car, unless he (the owner) was with it, and that upon the night of the accident the car was taken out by the chauffeur, under the direction of the sister of the owner and defendant, who made her home with the defendant, and was regarded as a member of the family.

We think that case is readily distinguished from the instant case. Here, when the chauffeur, Hall, took the automobile out on the trip when the accident occurred, he had no orders to do so from defendant, defendant's wife, or Miss Nott, who had been left in general charge of the house. No member of the family had given any orders to take it out. It was taken out without defendant's knowledge or consent, either express or implied, and was contrary to his express instructions. From this record, we think that it appears uncontradicted that the chauffeur acted in direct violation of his instructions, and outside the scope of his employment. He was acting either upon his own motion, or was obeying the instructions of Mr. Flood, Mr. Daggett, or some one else, who had no authority to bind the defendant.

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Counsel for appellant also cite and quote from *Steffen* v. *McNaughton*, 142 Wis. 49 (124 N. W. 1016, 26 L. R. A. [N. S.] 382). In that case it was held that a chauffeur, employed by the owner of an automobile to care for the machine and operate it at the request and direction of the owner, or any member of his family, and who is to go to his home for his midday meal, is *not*, when using the automobile to go to such meal, without the permission or knowledge of the owner, acting within the scope of his employment, so as to render the owner liable for his negligent act in injuring a pedestrian with the machine. Counsel quote the following language from the opinion:

"The law governing the liability of a master for the acts of the servant in this class of cases is embodied in the following comprehensive statement:

"'For all acts done by a servant in obedience to the express orders or direction of the master, or in the execution of the master's business, within the scope of his employment, and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instructions given, and the circumstances under which the act is done, the master is responsible.' *Ritchie* v. *Waller*, 63 Conn. 160 [28 Atl. 29], 27 L. R. A. 161 [38 Am. St. Rep. 361].

"While the rule of such liability may readily be comprehended, its application to the varying facts in cases of this class is often attended with difficulty. The ultimate inquiry usually resolves itself into one of fact, under the particular evidential facts and circumstances of the case."

We have examined with care the authorities cited by appellant's counsel, but are unable to agree with counsel as to their applicability. In order to render the cited cases applicable, counsel are forced to the position that the testimony shows conclusively that the chauffeur, Hall, on the day and at the time of the accident, was using the machine for the benefit of Mrs. Roach, as well as for the defendant, and that the machine was used for the guests of the family and those in charge of the household.

We think that this position is not warranted by the un-

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disputed evidence in the case. We have already quoted from and called attention to the evidence, which shows conclusively, in so far as this record is concerned, that the chauffeur was not acting by authority of defendant, his wife, Miss Nott, or any member of the family, but against the positive and explicit instructions of the defendant. If it can be said that there is any presumption in such a case that the chauffeur was acting within the scope of his general employment, we think that in this case that presumption is completely overthrown by the uncontradicted evidence in the case. Upon the facts, it cannot be said that there is any conflict in the case. For that reason, the numerous Michigan cases cited by appellant's counsel are not in point.

In the recent case of *Hartley* v. *Miller*, 165 Mich. 115 (130 N. W. 336, 33 L. R. A. [N. S.] 81), we discussed somewhat at length the rules of law applicable in cases of this kind, in this State, prior to the going into effect of Act No. 318 of the Public Acts of 1909. We there said that the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of some neglect or wrong at the time, and in respect to the very transaction out of which the injury arose; and that the cases are controlled by the general rules of law governing the relation of master and servant, or principal and agent.

In addition to the authorities cited in *Hartley* v. *Miller*, *supra*, we call attention to the discussion of this subject in Berry on Law of Automobiles, §§ 135 to 145, and the many cases there cited; Huddy on Automobiles (2d Ed.), pp. 245 to 251, and cases cited.

The test of the liability of the master for his servant's acts is whether the latter was at the time acting within the scope of his employment. The phrase "in the course or scope of his employment or authority," when used relative to the acts of a servant, means while engaged in the service of his master, or while about his master's business.

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It is not synonymous with "during the period covered by his employment." We are of opinion that the trial judge did not err in directing a verdict for the defendant.

Error is also assigned because the court excluded evidence of the statements of the chauffeur, made on the occasion of the accident. The statements not being made by the chauffeur while engaged in the business of the defendant, but while he was violating the defendant's express orders, he could not bind defendant by any of his acts or statements, and it was no part of the *res gestæ*. *Patterson* v. *Railway Co.*, 54 Mich. 91 (19 N. W. 761); *Hall* v. *Murdock*, 119 Mich. 389 (78 N. W. 329).

We find no error in the record, and the judgment of the circuit court is affirmed.

McALVAY, BLAIR, OSTRANDER, and BIRD, JJ., concurred.

PEOPLE *v.* SARTORI.

1. HOMICIDE — EVIDENCE OF SIMILAR ACTS — RES GESTÆ — MURDER.

   In a prosecution for murder, evidence showing that the son of the deceased victim was killed at the same time by having his throat cut was admissible.

2. SAME — MATERIALITY.

   Whether or not the evidence was material, the admission of testimony concerning an arrangement for a meeting between the deceased and one who was jointly accused with respondent was not prejudicial error.

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3. EVIDENCE—ADMISSIONS—CRIMINAL LAW—PRESUMPTIONS—CONFESSION.
The mere fact that a respondent under arrest and in jail made a statement of the alleged facts concerning the crime to the prosecutor in the presence of an interpreter does not give rise to a presumption that his statement was involuntary.

4. SAME—LEADING QUESTIONS—TRIAL.
The permitting of leading questions is very largely discretionary with the trial judge.

5. SAME—WITNESSES—PHYSICAL CONDITION.
Testimony relating to the physical condition of one of the principal witnesses for the prosecution, and to her alleged paralyzed condition, was not improperly received.

6. SAME—DECLARATIONS AGAINST INTEREST—HEARSAY.
Nor was it improper to reject testimony of a witness that a third person had admitted that he committed the murder: evidence of such conversation was hearsay, as would also be a statement that another killed decedent.

7. APPEAL AND ERROR — ARGUMENT OF PROSECUTOR — SAVING QUESTIONS FOR REVIEW—EXCEPTION.
Exceptions to argument of the prosecutor taken without any request for a ruling by the court were insufficient to warrant a reversal.

8. SAME.
Where the court is asked to rule, and neglects or omits to do so, the effect is the same as an adverse ruling upon the objection.

9. SAME—TRIAL—CONDUCT OF PROSECUTOR.
Reference of a general sort by the prosecuting attorney to the fact that respondent and his witnesses were foreigners was not reversible error.

10. CRIMINAL LAW—EXAMINATION—WAIVER.
The objection that respondent had no preliminary examination was presented too late, on motion for a new trial; and the respondent waived the right by declining to take the stand when asked if he desired to do so by the court.

11. SAME—APPEAL AND ERROR.
The court will not consider piecemeal a request to charge which was refused, and which is not claimed to have been, as a whole, erroneously refused.

12. SAME—NEW TRIAL.
Held, on a consideration of the entire record, that the verdict was not against the weight of the evidence.

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Error to Kent; Perkins, J. Submitted November 17, 1911. (Docket No. 192.) Decided January 23, 1912.

Bartolomeo Sartori was convicted of murder. Affirmed.

George Clapperton and *C. G. Turner*, for appellant.

Franz C. Kuhn, Attorney General, and *William B. Brown*, Prosecuting Attorney, for the people.

BLAIR, J. The respondent was tried and convicted of murder under an information charging that:

"Bartolomeo Sartori, Gustavo Iacovoni, and Ulderico Iacovoni, late of the township of Walker of the county of Kent, on, to wit, the 5th day of September, 1909, at the township of Walker, Kent county, aforesaid, did feloniously, wilfully, and the said Bartolomeo Sartori of his malice aforethought, and the said Gustavo Iacovoni of his malice aforethought, and the said Ulderico Iacovoni of his malice aforethought, then and there did kill and murder one Mario Pavoni."

The Iacovonis demanded separate trials, and respondent Sartori was tried first. Some nine months later, the respondent Ulderico Iacovoni, son of the respondent Gustavo Iacovoni, was tried and acquitted, whereupon a *nolle prosequi* was entered against Gustavo.

Mario Pavoni lived upon a rough, very hilly piece of land, upon which was an old run-down peach orchard. His house stood upon the north side of an east and west highway near the foot of a hill. The hill began at the highway and extended upward at an angle of 35 degrees 250 to 300 feet, then down on the other side across a narrow valley, and then up another hill not so high or steep as the first. The top of this second hill was about 750 feet from the house in which Pavoni lived, and north of the house. East of this peach orchard was a strip of woods, at Pavoni's east line. North of Pavoni's land, about one-third of a mile, was another peach orchard,

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which extended to a little lake further north, and which lake was about a mile from Pavoni's house. The second hill above referred to sloped to a deep valley, beyond which was a third hill.

Mrs. Pavoni testified: That she and her husband got up at about 6:30 o'clock on Sunday morning, September 5th, and their son Alfredo, 12 years old, got up four or five minutes later. That her husband went out "saying that he would go right over the hill and look over the peach orchard." That Alfredo went after the cow. That after her husband started up the hill Gustavo Iacovoni came to the house, and, 30 or 40 feet behind the house, and towards the woods, she saw Sartori and Ulderico Iacovoni going up the hill. At this time, her husband, who had got about halfway up the hill, turned and came back and joined in the conversation. That her husband went back up the hill with Gustavo, and she saw them as far as the top of the hill. That the Iacovonis and Sartori had guns, but her husband did not. That near the top of the hill her husband tried, as appeared by his motions, to get Gustavo's gun, but did not succeed. That some four or five minutes after her husband went over the hill Alfredo followed him. That four or five minutes after her son passed the hill she heard two shots, and then screams of her husband, followed by screams from her son. That thereupon she fell off the steps in a hysterical fit.

Vincennes De Petris, a boarder at Pavoni's, testified that he saw Alfredo go over the hill, and six or seven minutes after he went over the first hill he heard two shots with hardly any interval between them, maybe a second, and then he heard the cry.

"As soon as the shots were heard, Pavoni's wife began to holler and cry that they killed both, and of course he put attention to Pavoni's wife."

In a short time he went over the hill, finding Hugo Imperi there at the top of the hill. Hugo had no gun. That they then went on and found the bodies of Pavoni

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and his son near the top of the second hill. The body of Pavoni lay some 80 or 90 feet west of the woods on his east line and from 10 to 15 feet further south than the body of his son. A trail of blood showed that he had dragged himself some 25 or 30 feet down the hill. There were shots on the east side of a peach tree near where Pavoni was killed, showing that the charges came from the east. There were numerous shot in Pavoni's body, his wrist was shattered, there were powder marks and bruises on his neck, and his face was scratched up. There were two knife wounds penetrating his lungs, which the coroner said were the direct cause of his death. The boy had been killed by three separate cuts across and around his throat with a knife.

No witness testified that he saw the murder committed, but Sartori testified to what occurred upon his being overtaken by Pavoni; and, upon the trial of Ulderico Iacovoni, he and his father testified upon the same subject. According to Sartori:

"He hadn't seen Pavoni until when he saw him right in his back on the third hill."

That prior to that day Pavoni, "He say, 'Don't come near my land nor in my house.'" That after Pavoni ordered him off his land, Pavoni tried to get Gustavo's gun, and, failing, became enraged and jumped towards him, whereupon he, backing up, threw down his cap in front of Pavoni and told him that if he passed the cap he would "do away with" him. That thereupon Pavoni backed away and started for home, saying, as he went away:

"Saturday I will have my own gun, and then we will see one another."

That then Sartori and the Iacovonis went away towards the lake. That he did not see Alfredo that morning and did not again see Mario Pavoni. On the way to the lake he heard two shots at an interval of about a second

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apart back towards Pavoni. That "they had then walked about 200 meters probably, or more." That he never thought to look back to see where the shots came from, but continued on his way to the lake. That he intended to shoot Pavoni in the leg if he passed the cap.

There was testimony tending to show enmity between Pavoni and Sartori growing out of Sartori's alleged advice to Mrs. Pavoni to run away with a young man by the name of Guarino De Bartolomeo, and that each had threatened the life of the other. Pavoni had forbidden Sartori to come near his land or in his house.

Respondent's assignments of error, upon which he relies for a reversal, are as follows:

(1) That the said trial court erred in admitting testimony in relation to the killing of the boy Alfredo Pavoni.

(2) There was an error in admitting the following questions and answers:

"*Q.* Do you know whether or not Iacovoni had arranged with Pavoni to have Pavoni come over to Iacovoni's that night?

"*A.* Yes, sir.

"*Q.* What was the arrangement about? Why did Pavoni agree to come over to Iacovoni's? What was it that Pavoni was coming over there to see about?"

(3) That the court erred in refusing to strike out the testimony of Guiliani, who acted as an interpreter in quizzing the respondent in the jail immediately after their arrest.

(4) The court erred in admitting the answers to leading questions found on pages 143 and 189 of the record.

(5) The court erred in admitting the witness Innocence Pavoni to testify in relation to her own physical condition.

(6) The court erred in excluding the testimony of Joseph Martini in relation to what Sacciucci told him the morning after the murder about the killing of Pavoni.

(7) The court erred in permitting the remarks of counsel for the people in his opening and closing argument to the jury, to which objection was made by counsel for respondent, and which appear in the record.

(8) That the court erred in proceeding with the trial of this case without previous examination of the respondent or waiver of examination by him.

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(9) That the court erred in denying to give the respondent's request to charge.

(10) The court erred in denying the motions for a new trial made on behalf of the respondent Sartori.

1. The court did not err in permitting evidence of the boy's wounds. *People* v. *Marble*, 38 Mich. 117; *People* v. *Foley*, 64 Mich. 148 (31 N. W. 94); *People* v. *Wright*, 89 Mich. 70 (50 N. W. 792).

2. These questions related to an arrangement between Pavoni and Iacovoni to go to Grand Rapids and get a bicycle previously loaned to Pavoni by Iacovoni and which Pavoni had left at a shop for repairs. We do not perceive how the admission of this testimony, if erroneous, was in any wise prejudicial to respondent.

3. The witness Guiliani was called to the jail after the arrest of the respondent to act as an interpreter of the questions put by the prosecuting attorney and the answers of Sartori. He was called and examined on the trial by the prosecution without objection and cross-examined at length by respondent's counsel. After the next witness had been sworn and a few preliminary questions answered, the following occurred:

"*Mr. Turner:* Just a minute. I want to make a motion for the purpose of getting it on the record there, your honor. I move that all this testimony by the witness just sworn before this one, John Guiliani, or something like that, be stricken out from the record on the ground that Sartori at that time was arrested and in the hands of the law, so to speak, and subjected to a cross-examination by the prosecutor down there with no one to represent him, and whatever he said, if he did say anything, was an involuntary statement, brought out by that kind of a process; in other words, it was making him testify against himself. I ask to have that testimony stricken out on that ground.

"*The Court:* I will think that over.

"*Mr. Turner:* And the same in relation to this witness, your honor.

"*The Court:* I will reserve the determination of the question until later. We will let it stand.

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"*Q.* Herman, do you remember the day you were down in the jail talking with Sartori and Iacovonis?
"*A.* Yes.
"*Q.* You were down there?
"*A.* Yes, sir.
"*Q.* What day of the week was that?
"*A.* Tuesday.
"*Mr. Turner:* Just a minute, Brother Brown. May the same objection, your honor, apply to this witness?
"*The Court:* It may.
"*Mr. Turner:* And an exception."

The court did not overrule the motion of respondent's counsel, but let the testimony already taken stand and reserved the question of its competency until later. The only exception taken appears to apply to the testimony then being given by the witness Mancheralli. The matter does not appear to have been again brought to the attention of the court, and there is no basis for the assignment of error. *People* v. *Van Driesche*, 154 Mich. 158 (117 N. W. 578).

Furthermore, there is no testimony as to whether the statements were voluntary or involuntary, and we do not think that the mere fact that the respondent was in the jail under arrest raises a presumption that the statements were involuntary.

4. The objection is not to the answers given, but to the leading form of the questions. The questions to Mrs. Pavoni and the answers were as follows:

"*Q.* What did he say to you that he would do in reference to killing your husband?"

And the interpreter replied:

"*A.* She say that if he would see that her husband would show act of doing him harm, he would kill him.
"*Q.* What did he say about being willing to kill your husband, if you would go away with him? * * *
"*Q.* And what did she know about Sartori—what did you know about Sartori that made you think that there was going to be trouble?

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"*Mr. Turner:* Objected to as leading, and an exception.

"*The Court:* Go ahead; ask the question.

"*A.* Because she knew that they had a quarrel before.

"*Q.* Then when you asked Vincennes De Petris to go up with your husband, you thought he was in danger from Sartori, didn't you?

"*Mr. Turner:* That is objected to as leading and an exception.

"*The Court:* Go ahead.

"*A.* Yes."

The permitting of leading questions is very largely within the discretion of the circuit judge, and counsel on both sides were given wide latitude in this regard. We do not think there was such an abuse of discretion as to warrant a reversal of the case.

5. As stated in respondent's brief:

"This witness, Mrs. Pavoni, was repeatedly interrogated in relation to her physical condition. On one occasion she was led to testify that she had been sick all the previous night. On another, that she walked only with assistance; her side being paralyzed. Again, it was announced that the doctor was coming to see her, and he desired to ask her a few more questions, if that could be done. This could only furnish a basis for comment to the jury, and tend to work upon their sympathy, to the prejudice of respondent."

We think it was proper to show to the jury the physical condition of this most important witness in order that they might intelligently weigh her testimony.

6. Respondent's witness Joseph Martini testified that he had a talk with Antonio Sacciucci the day after the tragedy. It was the theory of respondent that Sacciucci was the man who committed the murder, and several suspicious acts and circumstances were testified to against him. Martini was asked:

"*Q.* Did you have any talk with him there about who did the killing?

"*A.* Yes, sir."

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He was then asked for the conversation, which was objected to as hearsay, and the objection was sustained. The ruling was correct. Whether Sacciucci would have answered that he saw some one else commit the murder, or whether, as the record indicates was expected, he would say that Sacciucci told him that he himself committed the murder, would be alike hearsay. The acts of Sacciucci having some relation to the crime and tending to show that he committed it instead of Sartori were competent and were admitted; his declarations, statements, and admissions not part of the *res gestæ* were not competent. *People* v. *Stevens*, 47 Mich. 411 (11 N. W. 220); *Commonwealth* v. *Chabbock*, 1 Mass. 144; *State* v. *Hack*, 118 Mo. 92 (23 S. W. 1089); *Rhea* v. *State*, 10 Yerg. (Tenn.) 258; *People* v. *Hall*, 94 Cal. 595 (30 Pac. 7); *Robison* v. *State*, 114 Ga. 445 (40 S. E. 253); *Hauk* v. *State*, 148 Ind. 238 (46 N. E. 127, 47 N. E. 465); *State* v. *Sale*, 119 Iowa, 1 (92 N. W. 680, 95 N. W. 193); *State* v. *West*, 45 La. Ann. 928 (13 South. 173); *Munshower* v. *State*, 55 Md. 11, 18 (39 Am. Rep. 414); *Commonwealth* v. *Densmore*, 12 Allen (Mass.), 535; *State* v. *Fletcher*, 24 Or. 295, 300 (33 Pac. 575).

7. Except in one instance counsel for respondent contented himself with taking an exception to particular portions of the argument of the prosecuting attorney without asking for, or obtaining, a ruling thereon by the court. Under repeated rulings of this court, such exceptions cannot be considered. *Maclean* v. *Scripps*, 52 Mich. 214 (17 N. W. 815, 18 N. W. 209); *Miller* v. *Lachman*, 117 Mich. 68 (75 N. W. 284); *Mayo* v. *Wright*, 63 Mich. 32 (29 N. W. 832); *Pierson* v. *Railroad Co.*, 149 Mich. 167 (112 N. W. 923); *Formiller* v. *Railway*, 164 Mich. 653 (130 N. W. 347); *Meade* v. *Railway*, 165 Mich. 489 (130 N. W. 1114). The one instance where a ruling was asked was as follows:

"And I want to say to you now that that one case of Martini shows you that the people of a country, not born in this country, who do not speak our language, these people are

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more inclined on general principles, some little time after a murder has been committed, to side with the live man than they are with the dead man.

"*Mr. Turner:* Give me an exception to that.

"*Mr. Brown:* On general principles, a man, other things being equal, after the acrimony and shock of the immediate event has passed away—

"*Mr. Turner:* I call the court's attention to that statement.

"*Mr. Brown:* The—

"*Mr. Turner:* Wait just a moment, Mr. Brown. I call the court's attention to the statement Brother Brown makes that people of a foreign country coming here are more apt to side with the live man than they are with the dead—

"*Mr. Brown:* And in evidence of that fact—

"*Mr. Turner:* And I ask the court to tell the jury not to pay any attention to that statement.

"*Mr. Brown:* As I was saying, this man Martini, after he talked to me—

"*Mr. Turner:* Give me an exception."

Where, as in this instance, the attention of the court is called to the objection, a ruling requested, and no ruling made, we think the effect of the refusal or failure to rule should be held to be the same as an adverse ruling.

The witness Adolph Martini, although his name was on the information, was called by the defendant and testified:

"*Q.* Did you know Pavoni?

"*A.* Yes.

"*Q.* Did you ever hear him say anything about Sacciucci?

"*A.* He says that he heard several times Pavoni say that he want to drink the blood of Bartolomeo Sartori, of Bartolomeo Guarino, of Piero, and Tony Sacciucci.

"*Q.* Wanted to drink the blood, is that it?

"*A.* Yes, sir.

"*Q.* Where did you hear him say that?

"*A.* In the month while his wife was away. * * *

"*Q.* Did he say why he wanted to drink their blood?

"*A.* Because they had ruined his home.

"*Q.* Did he say what Sacciucci had done towards him?

"*A.* He said that he gave some kind of medicine to his wife."

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On cross-examination the witness admitted that he came to the prosecuting attorney of his own accord and told him what he knew about the case in the presence of an officer by the name of Sargeant, but denied that he said to him that he had heard Sartori say three or four times that he would kill Pavoni. Mr. Sargeant testified that he heard the conversation referred to, and that Martini did say to the prosecuting attorney that he heard Sartori say three or four different times that he would shoot Pavoni. So far as Martini was concerned, the prosecuting attorney was justified by the record in his statement. While it would have been better if he had omitted foreigners generally from his statement, we do not think it could be justly held that his general reference could have prejudiced the respondent. *People* v. *Sharp*, 163 Mich. 79 (127 N. W. 758).

8. This point was not made until the motion for a new trial, and was then too late. *Conger* v. *Hall*, 158 Mich. 447 (122 N. W. 1073).

We are also of the opinion that the examination was waived. Several witnesses were examined on behalf of the people and cross-examined by counsel for the Iacovonis; Sartori not being represented by counsel. At the conclusion of the testimony the following questions were put to Sartori through the interpreter:

"*Q.* Mr. Sartori, do you want to examine any of the witnesses in this case, in your defense, or in your behalf?
"*The Court:* At this time?
"*A.* He says the testimony has been introduced, and he is satisfied with that.
"*Q.* Do you want to go on the stand yourself here?
"*A.* He says he wants to be examined.
"*Q.* Here? Now?
"*A.* He leaves it entirely with the court.
"*Q.* It's up to him.
"*A.* He says let him be examined now.
"*Q.* Who?
"*A.* This man here (meaning Mr. Magini).
"*The Court:* Himself?

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"*Q.* Does Sartori want to be examined now?
"*A.* He wants to be examined now.
"*The Court:* Tell him the Iacovonis are not going to be examined now.
"*A.* He says he will do like the others.
"*Q.* Ask him if he wants to go on the stand here or not. He can go on the stand and tell his story if he desires?
"*A.* He says he does like the others. He agrees with the others.
"*Q.* Then you don't want to be examined now?
"*A.* No."

9. Under this assignment, counsel argue that:

"The court should have given to the jury that portion of respondent's request to charge which reads as follows:

"'I charge you that the mere fact of Sartori being in the vicinity of the crime when it was committed is no evidence that he committed the crime, and the mere fact of his being in the vicinity where the crime was committed, and the further fact that Pavoni had made threats against him, and the mere fact that some months before Sartori said that he would protect himself by using a gun, if necessary, would not in itself be any evidence of murder.'"

The portion of the request constitutes about half of the request as presented. We cannot consider requests to charge piecemeal, and, since it is not contended that the court erred in refusing the request as a whole, we decline to further consider the question.

10. This assignment raises the question most relied upon by counsel for respondent in their printed brief and in the oral argument before this court. The verdict of guilty was rendered October 11, 1909, and was followed by sentence for life at the Marquette prison on October 12, 1909. Some time in June of 1910, a motion was made on behalf of respondent for a new trial. The motion itself has not been returned, and the only means we have of ascertaining its grounds is from the reasons filed by the circuit judge in denying it July 20, 1910, wherein it is said:

"It is urged in support of the motion: (1) That Sartori and the two Iacovonis having been jointly charged with these murders, and separate trials having been de-

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manded, Sartori, being first tried, was therefore deprived of the testimony of the Iacovonis in his behalf; (2) that the subsequent trial of the younger Iacovoni resulted in his acquittal, and afterwards a *nolle prosequi* was entered as to the elder Iacovoni, and these facts should be considered as indicating at least the probable innocence of Sartori; (3) that on the trial of her son, the younger Iacovoni, Mrs. Iacovoni testified that her brother Sacciucci confessed to her before leaving the country that he was guilty of these murders."

The reasons which influenced the circuit judge to deny the motion are substantially stated in the first paragraph thereof, as follows:

"I am still convinced, as I was at the conclusion of the trial, that no mistake was made by the jury in its verdict of guilty in this case. A horrible double murder was committed, and all of the facts and circumstances showed with unerring certainty that Sartori, either alone or in company with others, is responsible for the crime. He had debauched Pavoni's household, had been forbidden by Pavoni to set foot upon his land, and the deepest feelings of hatred existed between them."

After a statement of the facts influencing his judgment, at some length, the trial judge concluded:

"I do not think that justice requires a new trial of this case. The respondent was ably defended. Many witnesses were called and testified in his behalf at the county's expense, and every effort possible was made to give him a fair trial. The overwhelming weight of the circumstances, in connection with his own testimony, led the jury to believe that he was guilty as charged; and it seems to me, under the undisputed testimony in the case, they were justified in reaching that conclusion."

On the 15th day of September, 1910, a second motion for a new trial was filed by respondent's counsel, based upon the following grounds:

(1) The records and files in said cause.
(2) The records and files in the case of People v. Ulderico Iacovoni in this court.
(3) Newly and after discovered evidence consisting of

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testimony of Gustavo Iacovoni, Ulderico Iacovoni, Angelina Sacciucci and Philomena Iacovoni taken in the said trial of Ulderico Iacovoni.

(4) The affidavits of respondents, Gustavo Iacovoni, Ulderico Iacovoni, Herman Mancheralli, and George Clapperton attached hereto and made a part of this motion, setting forth new and after discovered evidence.

October 5, 1910, the circuit judge filed an order denying the second motion, saying:

"I am unable to find any new or additional reasons advanced on this motion which should lead me to change the opinion already expressed and on file on the first motion."

On the 24th day of August, 1910, the bill of exceptions, including the assignments of error, was settled and signed by the circuit judge. On April 6, 1911, by the order of this court, the respondent was permitted to review the case upon the typewritten record; the printing of the record under the rule being dispensed with. The index to the typewritten record does not comply with Rule 36 in stating "the page of the record where any exception relied on may be found." This failure has greatly increased our labor in the examination of this voluminous typewritten record.

The reading of the entire bill of exceptions and the records and files returned to this court, however, fails to disclose any exceptions claimed or filed to the reasons for the order or the order itself denying the motions for a new trial. Under such circumstances, we have repeatedly held that we cannot consider the motions. *Comstock* v. *Taggart*, 156 Mich. 47 (120 N. W. 29), and cases cited; *U. S. Graphite Co.* v. *Saginaw Circuit Judge*, 158 Mich. 598 (123 N. W. 27). Our examination of the record, however, has satisfied us that we would not have been warranted in overruling the order denying a new trial on the ground that justice required it, if exceptions had been properly filed.

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It is apparent that the trial judge was as earnest in his conviction of the guilt of the respondent as his counsel are of his innocence. The circuit judge, also, who saw these witnesses upon the stand, and the jury, to whom their testimony was addressed, and who were taken to view the premises, had an advantage over any one merely reading the record of their testimony in determining the credibility of the witnesses; and, the trial judge having set the seal of his approval upon the verdict of the jury, the case must be strong indeed to authorize this court to overturn his decision.

"The verdict must be clearly against the great weight of the evidence, to require this court to overrule the decision of the circuit judge refusing a new trial." *Gardiner* v. *Courtright*, 165 Mich. 54 (130 N. W. 322), and numerous cases cited.

See, also, *People* v. *Francis*, 52 Mich. 575 (18 N. W. 364); *People* v. *Moore*, 52 Mich. 563 (18 N. W. 359); *People* v. *Girdler*, 65 Mich. 68 (31 N. W. 624).

We agree with the circuit judge that the verdict was in accordance with, and not against, the weight of the evidence.

The judgment is affirmed.

MCALVAY, STONE, OSTRANDER, and BIRD, JJ., concurred.

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PEOPLE *v.* SCHAFRAN.

1. INTOXICATING LIQUORS—LICENSE—STATUTORY CONSTRUCTION.
   The Warner-Cramton law (Act No. 291, Pub. Acts 1909), introduced into the liquor laws a new element establishing other requirements than the mere payment of a tax as a prerequisite to engaging in the business, and is therefore subject to the rules pertaining to a license law, as distinguished from a tax law.

2. SAME—VESTED INTEREST—POLICE POWER.
   Since it is not within the power of the legislature to make an irrepealable contract as to matters that affect the public health or morals so as to limit the exercise of the police power, the licensee has no vested property right in his license, which may be granted on such conditions as the State sees proper to impose.

3. SAME—CONSTITUTIONAL LAW—FORFEITURE OF LICENSE.
   It was within the constitutional power of the legislature to provide that a retail liquor dealer's license should be forfeited if he should be twice convicted of violating the provisions of the liquor law; and the condition is not so unreasonable or oppressive as to be invalid.[1]

4. SAME—REVOCATION.
   The effect of two convictions is to forfeit the right of the licensee without further proceedings to revoke his rights.

5. SAME.
   The license is a mere privilege granted under the police power to carry on the business subject to the will of the grantor, and is not a contract or property interest protected by the Constitution.

6. SAME—REPAYMENT—STATUTES.
   No repayment of the license fee or any part thereof is contemplated by the statute as a limitation precedent to prosecution for selling without a license.

7. SAME.
   Nor, in the absence of statutory provision therefor, is the liquor dealer entitled to a rebate for the unexpired term.

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[1] Constitutionality of statute by which conviction of violation of liquor law entails revocation of license and prohibition of sale of liquor, see note in 30 L. R. A. (N. S.) 1004.

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Exceptions before sentence from the recorder's court of the city of Detroit; Connolly, J. Submitted November 17, 1911. (Docket No. 194.) Decided January 23, 1912.

Frank Schafran was convicted of engaging in the business of selling intoxicating liquors without a license. Affirmed.

Edward Minock, *Daniel Minock*, and *Thomas Mulvihill*, for appellant.

Franz C. Kuhn, Attorney General, *Hugh Shepard*, Prosecuting Attorney, and *Fred H. Aldrich*, Assistant Prosecuting Attorney, for the people.

STONE, J. The respondent was convicted in the recorder's court of the city of Detroit of having engaged in the business of selling and keeping for sale distilled, brewed, fermented, malt, mixed, spirituous, and intoxicating liquors on January 26, 1911, at No. 1,043 Russell street, in the city of Detroit, he not having had a valid license to engage in such business, as provided by Act No. 291, Pub. Acts 1909, commonly known as the "Warner-Cramton Law." It was also averred in the information that the license theretofore issued to respondent under said act had been revoked by reason of his violations of said act; that said respondent had been theretofore convicted in said recorder's court, which is a court of record, on January 26, 1910, and again on May 10, 1910, of violations of the provisions of said act; and that by reason thereof his license became forfeited and null and void, and that he was precluded and debarred from continuing in the retail liquor business. Yet it was averred that respondent had continued to conduct said business, he not then and there being a druggist, etc. Under respondent's plea of not guilty, the case was tried before a jury.

It was conceded on the trial of the case that the respondent had paid on May 1, 1910, $500 to the county

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treasurer, the amount required by said act, and had received a license in the usual form to carry on the retail liquor business, that his license was duly displayed in his place of business, and that he had the right under said license to continue in the business, unless that right was forfeited by his said two convictions on the charges of not closing his saloon on certain Sundays, in violation of said act. The facts are not in dispute. The people gave evidence tending to support the allegations of the information, and the respondent was convicted. The case has been brought here by respondent before sentence. It is the contention of respondent that so much of Act No. 291, Pub. Acts 1909, as forfeits the license of respondent, and debars him from continuing in the retail liquor business after having been twice convicted in a court of record of violations of said act, is unconstitutional and void; and he further contends that convictions of violations of the provisions of the act do not *per se* cause a forfeiture of his license.

Counsel for respondent requested the court, in writing, to instruct the jury to render a verdict of not guilty for the following reasons:

(1) Because no mode of procedure is provided by the Warner-Cramton liquor law, so called, for the forfeiture of the liquor license.

(2) That the forfeiture clause contained in said act is so oppressive and unreasonable that in this particular the act is void.

(3) That, inasmuch as the act does not provide for the taking of any legal procedure to declare a forfeiture of the license, no proceedings can be taken for that purpose. The act is in derogation of the common law, and, being a criminal statute, must be strictly construed. The attempt here made to declare the respondent's license forfeited is an assumption of power not authorized by the act.

(4) There can be no forfeiture of property unless the forfeiture is judicially determined, and the power so to determine must be provided by the act creating the forfeiture, and the court cannot assume power not granted by the act.

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(5) There being no proof in the case of the tender or repayment to the respondent of the license fee paid by him to the county treasurer before the commencement of this suit, no proceedings are authorized to be taken for the forfeiture of respondent's license under this act, and the verdict of the jury should be not guilty.

Error is assigned upon the refusal of these requests.

It will be well for us at the outset to refer to certain provisions of the act in question. In section 4 of the act it is provided as follows:

"Every person intending to engage in any business named in section one of this act, and requiring the payment of any license fee mentioned in said section one shall, on or before the first day of May in each year, make and file with the clerk of the township, village or city in which it is proposed to carry on such business, an application for a license in writing and on oath, showing the name and residence of such person, the ward, village or township in which it is proposed to carry on such sale or manufacture, and the nature of the business which such person is intending to engage in, and stating whether or not such person is a citizen of the United States and the State of Michigan and whether such person has, since the taking effect of this act, been convicted of any violation of the liquor laws of this State or any other State, or of any other laws of this State, and the time, place and number of such convictions, and containing an agreement that in the event of the issuance of a license to such applicant upon such application, such license shall be revocable as provided in this act. * * * Said board shall not approve the application of any woman, nor of any one who is not a citizen of the State of Michigan and of the United States, nor of any person who has served time in any State prison or penitentiary of this or any other State, nor of any person who has subsequent to taking effect of this act, been twice convicted by a court of competent jurisdiction of any violation of the liquor laws of this State or any other State. Subject to the provisions of this act said board or council shall approve applications for licenses."

Section 36 provides as follows:

"No license shall be issued to any one to engage in the retail liquor business in this State who has been convicted

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two times in a court of record of a violation of the liquor laws of the State of Michigan or any other State after this act takes effect, nor to any one who is not a citizen of the United States of America and State of Michigan, and any license obtained by any such person shall be of no force or effect and no protection to the person who undertakes to engage in said business, and he will forfeit the amount paid to obtain said license. Every license issued under the provisions of this act shall be upon the express condition that in event of the licensee being convicted two times in a court of record of violating the provisions of this act after this amendment takes effect, such license shall be revoked, forfeited and become null and void, and the licensee shall be forthwith precluded and debarred from continuing in the retail liquor business."

Section 7 of said act contains the following language:

"Any person or persons engaged in any business requiring the payment of a license fee under section one of this act, who, after paying the license fee so required, shall be a second time convicted of a violation of any of the provisions of this act, shall thereby forfeit entirely the privilege and rights conferred upon such person or persons by the license issued to such person or persons upon payment of the license fee herein required, and during the remainder of the period covered by such license such person or persons shall not carry on the business specified in said license at the place specified in said license."

1. In the recent case of *Fuchs* v. *Grass Lake Common Council*, 166 Mich. 569 (132 N. W. 96), we had occasion to discuss somewhat the power of the State to control and regulate the traffic in intoxicating liquors as a proper exercise of the police power, and we there cited authorities in support of the constitutionality of such legislation. We do not deem it necessary to repeat those citations. *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Jordan* v. *City of Evansville*, 163 Ind. 512 (72 N. E. 544, 67 L. R. A. 613), and note in 2 Am. & Eng. Ann. Cas. 96. In *Robison* v. *Haug*, 71 Mich. 38 (38 N. W. 668), Mr. Justice LONG, in discussing this question, said:

"The business of selling intoxicating liquors is one which the legislature has an undoubted right to regulate

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or prohibit, and it has therefore the power to impose such conditions and restrictions upon the sale as in its judgment may seem wise, where such restrictions are applied to all alike, or to the same class alike. It is within the power of the legislative branch of the State government, and is a part of the police regulations, such as the State may make in respect to the sale of intoxicating liquors for the prevention of intemperance, pauperism, and crime. It is not for the courts to determine its expediency, or, as said by Mr. Cooley in his work on Constitutional Limitations, 'to run a race of right, reason and expediency with the legislative branch of the State government.' If the legislature may altogether prohibit the liquor traffic, it may make such conditions if it is permitted to be continued, and place its sale under such restrictions as will make it easy to detect any violations of the law. * * * The business of selling intoxicating liquors has for many years, both in this country and in England, been regarded by legislatures and courts with disfavor; and it does not stand upon the same plane of utility and morality with many useful arts, trades, and professions."

In *Sherlock* v. *Stuart*, 96 Mich. 193 (55 N. W. 845, 21 L. R. A. 580), Mr. Justice GRANT said:

"The principle upon which is based the regulation of the liquor traffic is found in the police power of the State. No one possesses a natural, inalienable, or constitutional right to keep a saloon for the sale of intoxicating liquors. 'To sell intoxicating liquor at retail is not a natural right to pursue an ordinary calling.' Black on Intoxicating Liquors, §§ 46, 48. * * * 'If the governing power can prohibit a thing altogether, it can impose such conditions upon its existence as it pleases.' *Ex parte Christensen*, 85 Cal. 208 [24 Pac. 747]; *Crowley* v. *Christensen*, 137 U. S. 86 [11 Sup. Ct. 13].

"The system in this State is not purely a tax system. The fee to be paid as a condition precedent to entering upon the business is called a 'tax,' but there are other conditions precedent which are inconsistent with a purely tax system. These provisions partake of the character of a license. It is said by Black:

"'Any law which requires certain acts, other than the mere payment of a tax, to be done by the party, as a prerequisite to his right to enter upon the pursuit of the trade in question, and makes it a

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penal offense to engage in the business without such formalities, is in reality a license law, no matter whether it be called a "tax" or by any other name.' Black on Intoxicating Liquors, § 108."

Counsel for respondent rely largely upon the case of *Robison* v. *Miner and Haug*, 68 Mich. 549 (37 N. W. 21). That decision dealt with the liquor law of 1887. That was a tax law, taxing the traffic. We think that the Warner-Cramton act introduced into the liquor laws of this State a new element, rendering applicable the rules pertaining to a license law. The law of 1909, instead of providing for a mere application to carry on the business, requires an application under oath, in which the applicant makes certain representations and agreements, among them one that, in the event of the issuance of a license to such applicant upon such application, such license shall be revokable as provided in the act. This is followed by a license which differs very materially from the tax receipt given under the law of 1887, in that it is upon the express condition that, in the event of the licensee being convicted two times in a court of record of violating the provisions of the act, such license shall be revoked, forfeited, and become null and void, and the licensee shall be forthwith precluded and debarred from continuing in the retail liquor business.

The licensee has no vested property right in his license; in fact, it would not be in the power of the legislature to make an irrepealable contract as to that which affects public morals or public health so as to limit the exercise of the police power over the subject-matter. The license is granted to the licensee upon the condition that he shall not violate the provisions of the statute. The legislature having control of the subject of the traffic in, and use of, intoxicating liquors, may make such regulations to prevent public evils and prevent injuries resulting from intoxication as in its judgment are calculated to accomplish this end. It may prohibit the selling or giving away of liquors, or it may, while not interfering with the liberty of the sale or use, guard against the dangers of an indis-

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criminate traffic, and induce caution on the part of those who engage in the business by subjecting them to liabilities for consequential injuries. *Bertholf* v. *O'Reilly*, 74 N. Y. 509 (30 Am. Rep. 323); *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657. Again, in the absence of a provision in the Constitution of a State restricting the power of the legislature in reference to the sale of liquor, the legislature has the power to regulate the mode, manner, and the circumstances under which the liquor traffic may be conducted, and to surround the right to pursue it with such conditions, restrictions, and limitations as it may deem proper. *Giozza* v. *Tiernan*, 148 U. S. 657 (13 Sup. Ct. 721); *Gundling* v. *City of Chicago*, 177 U. S. 183 (20 Sup. Ct. 633); Joyce on Intoxicating Liquors, § 80 *et seq.* It is entirely within the province of the legislature, in the exercise of the police power of the State, to regulate the sale of intoxicating liquors, and to impose such restrictions upon those engaged in the business as will carry out its purpose. *State* v. *Settles*, 34 Mont. 448 (87 Pac. 445); *State* v. *Ludington*, 33 Wis. 107.

It was undoubtedly one of the objects of the Warner-Cramton law to improve the personnel of the business. This is rendered obvious by the provisions of the act which we have quoted. Inasmuch as a license is in the nature of a permit, creates no vested or property rights, and the traffic is at all times subject to the control of the State in the exercise of the police power, it follows that the State may at any time revoke licenses whenever it deems it for the public welfare. Joyce on Intoxicating Liquors, § 303, and cases cited. Revocation of a license is not so much for punishment within the meaning of the Constitution, as it is to prohibit an improper person from continuing in the business, because of violations of the law. Joyce on Intoxicating Liquors, § 303; *State* v. *O'Connor*, 58 Minn. 193 (59 N. W. 999). We have no doubt of the power of the legislature under our Constitution to provide that any number of convictions which it deems wise to provide may

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ipso facto work a forfeiture of the conditional license granted to a saloon keeper, where both the application and the license have made such a provision. We fail to see any constitutional infirmity in the statute in question, and we think that *Robison* v. *Miner and Haug*, *supra*, can be distinguished.

2. The second question urged by respondent's counsel is that the forfeiture clause in the act is oppressive and unreasonable, and is therefore void. It seems to us that the vital question is whether the two convictions provided for in the act *ipso facto* work a forfeiture of the license. In our opinion the trial judge was correct in charging the jury that two convictions operate *per se* to forfeit the license. We think that the language of the statute wherein it provides that, if any person engaged in the business shall be a second time convicted of a violation, he shall thereby forfeit entirely the privilege and rights conferred upon him, is very explicit and clear to the effect that the convictions shall operate as a forfeiture. It has been repeatedly held that such a provision in an ordinance or statute is valid. In *Sprayberry* v. *City of Atlanta*, 87 Ga. 120 (13 S. E. 197), the charter of the city was under consideration, in and by which the mayor and general council had full power to pass such ordinances as might to them seem proper for the security, peace, health, order, and good government of the city, and to regulate the retail of ardent spirits within its corporate limits. It was held that they had the power to ordain that the conviction, in a State court, of any person licensed to retail spirituous or malt liquors, for the violation of the State statute in relation to the sale of ardent spirits to a minor or a person already intoxicated, or the conviction of the retailer before the recorder's court for the violation of any of the provisions of the city ordinance regulating the issuance of licenses for retailing, should work an immediate revocation of the license of such person, and that for any further exercise of the privilege granted by such license he should be punished as one retailing without a license. It was

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held that the granting of such a license to sell liquor was an exercise of police power; that such license was not a contract, but only a permission to enjoy the privilege on the terms stated for a specified time unless it was sooner abrogated; and that by its revocation the citizen was not deprived of his property without due process of law. The court said:

"But it is claimed that he ought to have been notified by the mayor and council that his license had been revoked; that unless this was done, he must try the case himself and determine for himself whether it had been revoked or not by his conviction. What was the necessity of any notice to him? His license informed him that it was subject to be revoked. The law under which the license was granted informed him that his conviction would work an immediate revocation. What more notice could he desire? What other trial could he wish than the one he had already had in the superior court? When he was convicted there, the notice was ample that it operated as a revocation of his license. Nothing that he could have said or done before the mayor and council would have changed the record of his conviction, they would have had no discretion in the matter; the law was as imperative upon them as it was upon him. Upon the subject of the immediate revocation of a license by a violation of the condition upon which it is issued, the Court of Appeals of New York, in the case of the *People* v. *Meyers*, 95 N. Y. 223, says:

"'Under the provision of the excise act of 1873, which provides that a conviction for a violation of any provision of said act, or of the acts thereby amended, by any person or at any place licensed as therein provided, shall forfeit the license, and authorizes the board of excise upon being satisfied of a violation of any such provision to cancel or revoke the license, a conviction of a bartender of a licensed person for an offense under the act, committed at the place licensed, operates *ipso facto* to annul the license. The act casts upon the licensee the necessity, in order to protect himself in the enjoyment of his license, of seeing to it that no violation shall be committed upon the licensed premises. * * * It is competent for the legislature to prescribe such a cause of forfeiture.'

"In the case of *People* v. *Tighe*, 5 Hun (N. Y.), 25, it was held that the conviction of a licensee under any of

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the provisions of the act of 1873 *ipso facto* annuls his license. Moreover, we think that when Sprayberry applied for and accepted a license under this ordinance, he assented to the condition contained therein, and he has no right now to insist that it shall be adjudged forfeited by a judicial tribunal. He knew this to be the law when he applied for and accepted the license, and he knew that these terms, conditions, and restrictions were put upon him by his acceptance of it. He knew that when he was indicted and convicted for a violation of the State law, it worked an immediate revocation of the license."

See *Schwuchow* v. *City of Chicago*, 68 Ill. 444; *Wiggins* v. *City of Chicago*, 68 Ill. 372.

3. We have already covered the first, second, and third requests to charge, and have said that a license to sell liquor is not a contract, but only a promise to enjoy the privilege on the terms named for a specified time, unless it be sooner revoked. The granting of a license is an exercise of police power, and does not include any contractual relations whatever. *Stone* v. *Mississippi*, 101 U. S. 820. A license is a mere privilege to carry on a business subject to the will of the grantor, and it is not property in the sense which protects it under the Constitution. The revocation of a license does not deprive the citizen of his liberty or his property without due process of law. See, also, *Cassidy* v. *City of Macon*, 133 Ga. 689 (66 S. E. 941). It must be held that the respondent has had his day in court. It appears undisputed in the case that he paid the fines in both cases of Sunday violations, and he knew the conditions under which his license was held. It thereby became forfeited by reason of his own illegal acts. These conditions were provided for by the license itself, as well as in the application for the license. They were contained in the statute, which he was bound to know.

4. We have now discussed all of the questions raised by counsel except that covered by the fifth request to charge. It is contended that it was a condition precedent to the institution of the prosecution that the license fee paid by the respondent should have been tendered back, or repaid

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to him, and that the language of section 7, above quoted, must be so construed. We do not so read the statute. While there is a redundancy in the language used, there is in our opinion no provision for repayment of the license fee, or any part thereof. The words, "upon payment of the license fee herein required," undoubtedly refer to the payment by the person or persons for the license, and who have forfeited the privileges and rights conferred upon them by the license, and do not refer to any contemplated repayment before prosecution.

In the absence of a statute authorizing it, the licensee is not entitled to a rebate for the unexpired term upon revocation. Such a return is dependent upon the statute, and, where there is no statute, the licensee must be held as taking his license subject to such laws as prevail. 14 Current Law, p. 324, and cases cited; *McGinnis* v. *Inhabitants of Medway*, 176 Mass. 67 (57 N. E. 210); *Toman* v. *Town of Westfield*, 70 N. J. Law, 610 (57 Atl. 125); *City of Louisville* v. *Cain*, 134 Ky. 76 (119 S. W. 763); Joyce on Intoxicating Liquors, § 330, and cases cited.

We find no error in the record, and the conviction of the respondent is affirmed, and the trial court is directed to proceed to judgment.

MCALVAY, BLAIR, OSTRANDER, and BIRD, JJ., concurred.

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HICKEY *v.* LUNDY.

1. PLEADING—NOTICE OF SPECIAL DEFENSE—ADMISSIONS—APPEAL AND ERROR—COURT RULES.

   Although defendant's original plea and notice in justice's court set up a breach of warranty of quality of the goods purchased by defendant's wife, in assumpsit by the seller for the purchase price, plaintiff was not authorized to rely on any claimed admission of liability under the notice (Circuit Court Rule 7 *e*), where defendant, on discovering the nature of the contract that plaintiff claimed to have made with defendant's wife, amended his plea and notice so as to deny any liability thereon.

2. SALES—CONTRACTS—LEASE—HUSBAND AND WIFE.

   Within the provisions of a contract, stipulating that defendant's wife should pay as rental one dollar weekly for certain clothing, which she might purchase at the end of the term on paying one cent additional, and that the contract was not intended as one of sale, conditional or otherwise, defendant could not be held on the theory that plaintiff had sold necessaries to the wife of defendant.

3. SAME—IMPLIED CONTRACT.

   The contract being express, the law will not imply one.

4. SAME.

   And in the absence of testimony that the wife acted as defendant's agent, or that her act was ratified by him, a verdict for defendant was properly directed.

Error to Shiawassee; Miner, J. Submitted November 20, 1911. (Docket No. 148.) Decided January 23, 1912.

Assumpsit in justice's court by Anna L. Hickey against Harry Lundy for goods leased to defendant's wife upon a written contract. From a judgment for defendant, plaintiff appealed to the circuit court. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

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A. L. Chandler and *George E. Pardee*, for appellant.

Seth Q. Pulver, for appellee.

This action was commenced in the justice's court where the plaintiff declared orally in assumpsit and specially upon a certain written contract which was filed with the court and marked "Exhibit A." The contract is as follows:

"11—7—1910. 389. This agreement, made and executed this.....day and date, by and between D. E. Hickey & Co. (hereinafter called lessor) and..... (hereinafter called lessee) witnesseth, that the lessors have this day rented to the lessee the following goods, herein described:

"Description and value of goods.

"L. Suit 14 95

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"Valued at $.....for the period of.....from date hereof, the sum of $1.00 deposit, and for the further sum of $1.00 per wk. to be paid promptly at their store during the continuance of this agreement. And the lessee agrees to pay said several sums promptly, and not to remove the property from his or her premises without the consent in writing of the lessors. It is distinctly understood that this is a contract in renting only, and not a sale, conditional or otherwise, and that the whole contract is expressed in this instrument. If the lessee shall faithfully keep this agreement and make all payments therein stipulated, when due, then after the payments of the last installment or rent, the lessee may at his or her own option purchase the property by paying the lessors one cent purchase money. If the lessee does not keep the above agreement, it is understood and agreed that he or she will return said property to the lessors on demand, without process of law; and the lessors are authorized to enter lessee's premises by their agent or agents and remove the same, provided the lessee does not voluntarily surrender it. If default shall be made in the payment of any installment of rent, as aforesaid, then the whole of the remaining rent shall become immediately due and payable, and I, the lessee, do hereby authorize any attorney of any court of record, or elsewhere, to enter and confess judgment for the full amount of rent, as aforesaid, with cost of suit and attorney's commission for collecting, release all errors

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without any stay of execution, and I do hereby waive the right and benefit of any law of this or any other State, exempting salary, property, real or personal, from sale, giving full liberty to sell the same on (*fieri facias*) with release of all errors thereon.

"In witness whereof, we have hereunto set our hands and seals the day and year above written.

"Signed, sealed and delivered in the presence of.....

[Signed] "D. E. HICKEY & Co.

[Signed] "Mrs. NELLIE LUNDY.

"Address, 429 Howard.

"Lessee's occupation, Fireman.

"Employed at Sugar Fty."

To this declaration defendant filed a plea of general issue and gave notice thereunder that at the trial he would show a breach of warranty as to the quality of the goods in question and demand damages therefor. During the trial in the justice's court defendant was permitted to amend his notice as follows:

"Notice under plea of general issue; that contract upon which suit was brought is contract of rental, and not contract by which husband bound without express agreement on his part so to do; that defendant never agreed to terms of the contract, or authorized his wife to sign the same, or ever made any undertaking in regard to it; that after its execution Mr. Lundy, defendant, never ratified the contract or appointed his wife as his agent, or in any way ratified his contract so as to be binding on him."

Plaintiff, having been defeated in the justice's court, appealed to the circuit court. There a verdict was directed against her and she now reviews the case in this court by writ of error.

BROOKE, J. (*after stating the facts*). Plaintiff assigns six different reasons why she is entitled to a reversal of the judgment against her:

First. That under the notice attached to defendant's plea, under subdivision (*e*) of Circuit Court Rule No. 7, defendant's legal liability is admitted.

Second. It was a question for the jury whether the wife was the agent of the husband in doing what she did

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towards the purchase of the goods, and as to whether they were necessaries.

Third. Defendant is liable to plaintiff because of his subsequent ratification of his wife's acts, which is a question for the jury.

Fourth. Defendant is liable on his express contract to pay for the goods, which was a question for the jury.

Fifth. If no express contract is proven, then defendant is liable on an implied contract to pay for the goods, which is a question for the jury.

Sixth. The court erred in his rulings on the admission and rejection of testimony.

In discussing the first question raised, it is sufficient to say that defendant, upon learning of the existence of Exhibit A, promptly amended his plea as above set forth, and the trial thereafter proceeded both in the justice and circuit courts upon the amended rather than upon the original notice. In the circuit court, plaintiff offered testimony to establish the liability of defendant. She did not rely upon the original notice under the plea as admitting such liability. Counsel for plaintiff seem to have proceeded upon the theory that under the amended notice defendant denied all liability.

The second, third, fourth, and fifth grounds urged may be treated together. In each it is assumed that there was a contract of sale and purchase at least between plaintiff and defendant's wife. It seems to us plain there was no such contract. The contract was in writing. It is unambiguous and provides for a stipulated rental for the property in question. It was further specially pleaded by plaintiff as evidencing her right to recover. There being an express contract, there is no room left for implication.

We find no testimony in the record which tends to prove that in executing said contract the wife acted as agent for the husband or that the husband ever ratified her actions in the premises, and it is not claimed that he thereafter purchased the goods himself.

The liability of the husband for necessaries purchased by the wife is not questioned. The only testimony in this

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record, however, upon the question of whether or not the goods were necessaries is to the effect that they were not necessaries and it affirmatively appears that they were never purchased. A verdict having been properly directed in favor of defendant upon facts which are not in dispute, it is not necessary to consider the last ground urged for reversal.

The judgment is affirmed.

MOORE, C. J., and STEERE, MCALVAY, and BIRD, JJ., concurred.

SCHRAM *v.* ROGERS.

WILLS—DEVISE—CONSTRUCTION.

A devise by testatrix to her brother, followed by a declaration in a succeeding clause of the will that it was the wish and desire of testatrix that her nephew, a beneficiary under the will, should have an equal share in the property so devised with other children of the devisee at the death of such brother, operates as a conveyance of the fee simple; the language in the separate and succeeding clause operating merely as an expression of a desire, does not limit the estate conveyed.

Case-made from Barry; Smith, J. Submitted November 22, 1911. (Docket No. 163.) Decided January 23, 1911.

Ejectment by Nellie M. Schram as guardian of Horatio E. Warner, and in her personal right, and another, as plaintiffs, against Daniel W. Rogers. Judgment for plaintiffs. Defendant brings case-made. Reversed.

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Thomas Sullivan, for appellant.

Colgrove & Potter, for appellees.

BLAIR, J. This is an action of ejectment, brought by Nellie M. Schram, as guardian of Horatio E. Warner, and in her own right, and Lillie Belle Curtis, as plaintiffs, against Daniel W. Rogers, as defendant. The action was brought by the plaintiffs to recover the N. ½ of lots Nos. 297 and 298 of the city of Hastings, according to the original plat of said city; each of the plaintiffs claiming an undivided one-third of said premises in fee simple.

The plaintiffs claim title in fee as heirs at law of Daniel C. Warner, deceased. The defendant claims title in fee simple through the foreclosure of a real estate mortgage given by Daniel C. Warner in his lifetime.

Daniel C. Warner obtained title to the premises in question through the last will and testament of Hannah Minerva Mixer, deceased. It is conceded that the determination of the case depends upon the construction to be given to the last will and testament of Hannah Minerva Mixer. If the will gave to Daniel C. Warner only a life estate in the premises referred to, then plaintiffs are entitled to recover. If it gave to Daniel C. Warner an estate in fee in the premises, then plaintiffs are not entitled to recover. The last will and testament of Hannah Minerva Mixer disposes of her estate as follows:

"*First.* It is my desire that all my just debts, funeral charges and expenses be first paid out of my estate.

"*Second.* I give, devise and bequeath to my brother, Daniel C. Warner, of Castleton, Barry county, State of Michigan, all of my property both personal, real and mixed, wherever the same may be situated, except as is hereinafter excepted and named, to have and to hold the same to himself, his heirs and assigns forever.

"*Third.* I give, devise and bequeath to my nephew, Charles Warner, the money and property now in his hands, and owing from him to me, to have and to hold the same forever.

"*Fourth.* I give, devise and bequeath to my nephew,

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Horatio E. Warner, the money and property in his hands owing from him to me, to have and to hold the same forever.

"*Fifth.* It is my wish and desire in case my said nephew, Horatio E. Warner, outlives my brother, Daniel C. Warner, that the said Horatio E. Warner shall have an equal share of the property herein bequeathed to Daniel C. Warner with said Daniel C. Warner's other children who may then be living."

For further facts, see *Rogers* v. *Schram*, 161 Mich. 278 (126 N. W. 423).

"In the construction of a will, the first duty of a court is to ascertain the intention of the testator. Such intention is to be ascertained from the whole will interpreted with reference to the obvious or manifest object of the testator. All parts of the instrument must be construed in relation to each other, so as to give meaning and effect to every clause and phrase, and, if possible, form one consistent whole; every word receiving its natural and appropriate meaning." *Foster* v. *Stevens*, 146 Mich. 131 (109 N. W. 265).

In the second clause of the will, the testatrix, by apt and technical language, gives, devises, and bequeaths her entire property to her brother absolutely, except only such "as is hereinafter excepted and named." In the third and fourth clauses, she proceeds to "give, devise and bequeath" the property "excepted and named" to her nephews absolutely. She has now disposed of her entire estate in clear and unambiguous language, without a hint of any reservation whatever. If the fifth clause is to be construed as cutting down the absolute estate granted to a limited estate for life only, then it is apparent that the clear language of the second clause was not used intelligently, and the intent so plainly expressed thereby must fail, as inconsistent with the intent expressed in the fifth clause. If, however, we construe the fifth clause in accordance with the natural meaning and the changed form of the language used, as compared with the accurate language used in the second, third, and fourth clauses, as an expression by the testatrix of a mere wish and desire

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on her part that her brother do not discriminate against his son Horatio in disposing of the property by will, then the entire will is harmonious, and every clause receives an interpretation consistent with its own language and that of all other clauses. Such construction we deem to be the proper construction of the fifth clause.

The judgment is reversed, and no new trial granted.

STEERE, MCALVAY, BROOKE, and BIRD, JJ., concurred.

GALLOWAY v. DETROIT UNITED RAILWAY.

1. CARRIERS—NEGLIGENCE—IMPUTED NEGLIGENCE—AUTOMOBILES.
   A passenger in the taxicab of a common carrier, injured by the concurrent negligence of the chauffeur and of agents of another carrier, is not barred from recovering against the other by the negligence of the driver of the taxicab.

2. SAME—STREET RAILWAYS—LOOKOUTS.
   Evidence that a street car was backed without warning from the main track upon a switch or Y across a portion of the street, while the conductor was in the forward end of the car, and no lookout was being maintained, tended to show negligence of the street railroad company contributing to a collision with a taxicab in which plaintiff was riding.

Error to Wayne; Donovan, J. Submitted November 21, 1911. (Docket No. 159.) Decided January 23, 1912.

Case by James S. Galloway against the Detroit United Railway for personal injuries. Judgment for defendant. Plaintiff brings error. Reversed.

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John T. Nichols (*James G. McHenry*, of counsel), for appellant.

Corliss, Leete & Joslyn (*A. B. Hall*, of counsel), for appellee.

Plaintiff hired a taxicab from the Bailey Auto Company of the city of Detroit and directed the driver to convey himself and daughter to Grosse Pointe. He gave no further directions to the driver and did not attempt to control his actions either in a selection of the route or in the matter of speed. At the corner of Jefferson and Field avenues in said city, defendant maintains a Y upon which it turns its Trumbull avenue cars. Those cars run easterly for some distance upon the southerly Jefferson avenue track. At Field avenue they Y up in a northerly direction, then turn, and proceed west on the northerly Jefferson avenue track. When the taxicab in which plaintiff was a passenger approached Field avenue it was following a Trumbull avenue car at a distance of about one-half block, running with the right-hand wheels outside the southerly rail of the south or east-bound track. The left-hand wheels of the machine were, of course, between the rails of that track. When the street car reached the Y at the junction of Field and Jefferson, it stopped and almost immediately thereafter started to back around the Y up Field avenue. It had backed but a few feet when it came into collision with the right hind wheel of the taxicab, which at the moment had turned out and was attempting to pass the car to the left. As a result of the collision, the taxicab was turned part way around. It dashed over to the north curb, struck and demolished a fire hydrant, and upset, pinning its occupants beneath it. This action is brought by the plaintiff to recover compensation for injuries sustained by him as a result of the collision. The charge was, in part, as follows:

"It is an open matter for you to say whether the handling of the car caused the accident, or whether the handling of the cab caused the accident. And I charge you

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now absolutely that, if the taxi made the accident, there can be no recovery in this case. * * * It must be caused by the D. U. R. alone to bind them, for they are the defendants. * * * When you get into your jury room and select your foreman, the usual practice is to take a ballot. And in an accident case like this, or in a negligence case, for we use that term, you would vote guilty or not guilty. It does not mean guilty of crime. It is not a criminal matter. But it means guilty of negligence. Guilty or not guilty, and if you can agree on not guilty, you will come in and find no cause of action. And if you find guilty, that would mean that the D. U. R. is guilty over and above anything that happened. That nobody else caused it; that they were guilty. * * * It is not for the court, and with the fact that, if the accident was caused by the taxicab driver, there can be no recovery, and if caused solely by the railway there could be a recovery, I will leave the case solely to you."

A verdict under the foregoing instructions having been rendered in favor of defendant, plaintiff reviews his case in this court by writ of error.

BROOKE, J. (*after stating the facts*). Counsel for defendant frankly concede that in instructing the jury that plaintiff could not recover unless he showed that the driver of the taxicab acted without negligence, and that his injuries were due solely to the negligence of the defendant, the learned circuit judge was in error.

It seems now to be settled, in this State at least, that, where one suffers an injury through the concurrent negligence of two common carriers, the negligence of the one upon whose conveyance the injured person is a passenger cannot be imputed to the passenger so as to bar his recovery against the other. *Cuddy* v. *Horn*, 46 Mich. 596 (10 N. W. 32, 41 Am. Rep. 178); *Little* v. *Hackett*, 116 U. S. 366 (6 Sup. Ct. 391).

But it is urged on behalf of defendant that the verdict should not be disturbed because (it is claimed) the court should have granted defendant's motion for a directed verdict upon the ground that plaintiff had failed to show

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any negligence on the part of the defendant which contributed to cause the injury to plaintiff.

Plaintiff produced evidence which (if true) tended to show that defendant by its agents stopped its car and suddenly, without warning, backed it up the Y across the northerly portion of Jefferson avenue, at a time when the conductor, instead of being upon the back end of the car and maintaining a proper lookout, was in the forward portion of the car where he could not see the approaching taxicab. This testimony was sharply contradicted by witnesses on behalf of defendant, but this is not a proper occasion to discuss the weight of the evidence. To entitle the defendant to a directed verdict, there must have been *no evidence* tending to show its culpability in the premises. We are unable to agree with counsel for defendant in his contention.

The judgment must be reversed, and a new trial ordered.

STEERE, MCALVAY, BLAIR, and BIRD, JJ., concurred.

CRONK *v.* MULVANEY.

1. PRINCIPAL AND AGENT—ESTOPPEL—EVIDENCE.
   Agency in fact may be implied where one person, by his conduct, holds out another as his agent and thereby invests him with apparent or ostensible authority as agent.

2. SAME—ADMISSIONS.
   Acts and admissions of defendant, after the commencement of suit, tending to show his acquiescence in the things done by his agent, were competent evidence against him.

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3. CUSTOMS AND USAGES — CONTRACTS — CONSIDERATION — WORK, LABOR AND SERVICES.

In an action of replevin for hay, which plaintiff grew on defendant's land under an arrangement which was silent as to the amount and method of compensating plaintiff for his services, evidence of a custom in the community to divide the hay in equal shares was properly admitted.

4. REPLEVIN—CROPS—PERSONAL PROPERTY.

After the severance of crops from the realty, they become personal property and are recoverable by one having the right of possession in an action of replevin.

Error to Eaton; Smith, J. Submitted November 21, 1911. (Docket No. 151.) Decided January 23, 1912.

Replevin by Delbert Cronk against Maynard Mulvaney for a quantity of hay. Judgment for plaintiff. Defendant brings error. Affirmed.

G. D. Blasier, for appellant.

George Huggett, for appellee.

This is an action of replevin to recover the possession of certain hay cut and stored by the plaintiff upon the defendant's premises. The record shows that in the spring of 1909 defendant was the owner of a farm lying near one owned by the plaintiff; that Fred Mulvaney, the father of the defendant, went to plaintiff, and asked him to take charge of defendant's farm, as they were going away; that said Fred Mulvaney represented to plaintiff that he had a power of attorney to act for his son in the premises. With reference to the hay, plaintiff testifies:

"He told me that I could either cut the hay myself, or let it in fields out to my neighbors—he mentioned one—and if I let it in fields, I was to see it was put in in good shape, or it was not cut too green, and was put in in a workmanlike manner."

Relying upon this arrangement, which contained no stipulation as to plaintiff's compensation for harvesting the hay, plaintiff in due season cut and placed the hay in

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a barn upon defendant's premises. Later in the season, Fred Mulvaney returned to the farm, and notified plaintiff that it was time to divide the hay. One mow was cut down through the center, and plaintiff drew his half away. It was determined to bale the balance. Plaintiff and Fred Mulvaney together furnished the help necessary for this operation. When part of the hay had been baled, plaintiff decided that his half of the balance should not be baled, as he desired to keep it for his own use. Thereupon the hay that remained in that mow was cut down through the center, and under the direction of Fred Mulvaney defendant's half was baled. This baled and unbaled hay seems to have remained in defendant's barn until the spring of 1910, when plaintiff went with men and teams to remove that portion which he claimed to be his. Defendant himself, who had meantime returned to his farm, refused to permit plaintiff to take any part of the hay. Plaintiff thereupon sued out a writ of replevin.

In executing the writ, the officer supposed that the unbaled hay in the mow would have to be divided. One present at the time remarked that it had already been divided, whereupon defendant said: "That is the hay as it was divided; that all belongs to Mr. Cronk." Evidence was admitted, over the objection of defendant, tending to show that it was the custom or usage in that neighborhood, where hay was properly cut and stored as this was, without an agreement as to compensation, for each party to take one-half of the crop. Plaintiff having recovered a verdict, defendant reviews his case in this court by writ of error.

BROOKE, J. (*after stating the facts*). The first four assignments of error argued by defendant are based upon rulings of the trial judge, by which he permitted plaintiff to testify to what occurred between himself and Fred Mulvaney at the time the hay was divided. Earlier in the trial, plaintiff had testified, without objection, to the fact that his bargain had been made with defendant's father, upon the father's representation that he had a

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power of attorney from his son, the defendant. We think the testimony was properly admitted. Agency in fact may be implied where one person by his conduct holds out another as his agent, and thereby invests him with apparent or ostensible authority as agent. 31 Cyc. p. 1219. 3 Current Law, p. 102. It is to be noted that the defendant did not deny that the arrangement had been made as claimed by plaintiff; indeed, Fred Mulvaney, who testified on behalf of defendant, said:

"I think I made a bargain with the man, and I wanted to close the bargain all up with him and settle up my affairs with him before leaving; and I did take these matters all up, and talked it over about the share of the hay and dividing it."

Assignments of error 5, 6, 7, and 8 refer to rulings of the court admitting testimony as to what was said and done by defendant after suit was commenced. This testimony was admissible, as it tended to show acquiescence by the defendant in the acts of his father as his agent.

Assignments of error 12 to 14, inclusive, relate to the admission of testimony as to usage or custom. The contract being silent upon the question of compensation for the service to be performed, evidence of custom or usage in that neighborhood was properly admitted. Beecher on Contracts, § 20, p. 45.

The fifteenth assignment of error raises the question of the propriety of the remedy by replevin. Where crops or timber are severed from the realty, they become personal property, and one entitled to the possession thereof may have recourse to the action of replevin. *Crapo* v. *Seybold*, 36 Mich. 444; *Spalding* v. *Archibald*, 52 Mich. 365 (17 N. W. 940, 50 Am. Rep. 253); *Sutherland* v. *Carter*, 52 Mich. 151, 471 (17 N. W. 780, 18 N. W. 223); *Antrim Iron Co.* v. *Anderson*, 140 Mich. 702 (104 N. W. 319, 112 Am. St. Rep. 434).

The judgment is affirmed.

MOORE, C. J., and STEERE, MCALVAY, and BIRD, JJ., concurred.

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CITY OF ALPENA, *for use of* GILCHRIST, *v.* TITLE GUARANTY & SURETY CO.

MUNICIPAL CORPORATIONS — BONDS — MECHANICS AND MATERIALMEN—FUEL.

Coal used for fuel to operate a dredge that a municipal contractor employed in digging a trench for an intake pipe of the municipal waterworks, was not covered by the statutory bond of the contractor "against all claims due from said contractor or other subcontractors under them, which may accrue to any person, firm, or corporation on account of any labor performed or materials furnished under and by virtue of this contract."

Error to Alpena; Emerick, J. Submitted November 21, 1911. (Docket No. 157.) Decided January 23, 1912.

Assumpsit by the city of Alpena for the use of Frank W. Gilchrist against the Title Guaranty & Surety Company and others on a statutory bond. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

Henry & Henry, for appellant.

Luman W. Goodenough and *Irvin Long*, for appellees.

BLAIR, J. The facts essential to a decision of the issues involved in the above-entitled cause have been previously litigated in this court, and the bond and contract sued upon have been heretofore presented for adjudication to this court. We refer to the cases of *City of Alpena, for use of Besser*, v. *Title Guaranty & Surety Co.*, 159 Mich. 329 (123 N. W. 1126), *City of Alpena, for use of O'Brien*, v. *Title Guaranty & Surety Co.*, 159 Mich. 334 (123 N. W. 1127), and *City of Alpena, for use of Beaudrie*, v. *Murray Co.*, 159 Mich. 336 (123 N. W. 1128).

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The action in this case was brought by the city of Alpena, for the use of F. W. Gilchrist, as assignee of certain creditors, against the Murray Company and the Title Guaranty & Surety Company, to recover from the defendant Surety Company for material furnished and labor performed for the Murray Company under a contract with the city of Alpena for the construction of the city waterworks. In conjunction with the contract was a bond executed by the defendant the Title Guaranty & Surety Company, of Scranton, Pa. By this bond the Title Guaranty & Surety Company undertook —

"To indemnify and save harmless the said city of Alpena, the city council, and officers thereof, as herein stipulated, and to save harmless the people of the State of Michigan against all claims due from said contractor, or other subcontractors under them, which may accrue to any person, firm, or corporation on account of any labor performed or materials furnished under and by virtue of this contract."

One of the assignors of Gilchrist was the M. N. Bedford Coal Company. As indicated in the contract, one part of the work to be performed was the laying of an intake pipe. To lay such an intake pipe it was necessary that a trench be dug, and for this purpose a dredge was used by the Murray Company. The M. N. Bedford Company furnished to the Murray Company quantities of coal at various times during March and April, 1905. This coal was furnished the Murray Company for fuel to be used on the dredge. No payments were made upon the account between Bedford and the Murray Company, and the present action is brought upon the coal so furnished.

The sole question presented for our determination is, as stated in the brief for appellant:

"Whether or not the bond executed by the Title Guaranty & Surety Company constituted an undertaking on the part of the Surety Company to insure the payment to the M. N. Bedford Company of the coal furnished for fuel for the dredge in the construction of the waterworks system."

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The trial judge answered this question in the negative and directed a verdict for defendant. His ruling is in accordance with our decision in the case of *City of Alpena, for use of Besser*, v. *Title, Guaranty & Surety Co.*, 159 Mich. 329 (123 N. W. 1126). In that case the court cited with approval *Philadelphia* v. *Malone*, 214 Pa. 90 (63 Atl. 539), which involved the precise question before us in this case.

The judgment is affirmed.

STEERE, MCALVAY, BROOKE, and BIRD, JJ., concurred.

VOIGT BREWERY CO. *v.* HOLTZ.

1. LANDLORD AND TENANT — INJUNCTION — INTOXICATING LIQUORS. Having an adequate remedy at law, a brewing company which leased premises to a saloon keeper on condition that he should not purchase beer from any other party, is not entitled to an injunction against the saloon keeper to restrain him from buying beer from other manufacturers as the exigencies of his trade required, when it appeared that the tenant sold the lessor's beer as his principal commodity, and secured permission orally from defendant to sell the beer of other wholesale dealers as it might be called for, and that the amount of other beer so purchased was small and the probable damages inconsiderable.

2. SAME — FRAUDS, STATUTE OF — LEASE — PAROL WAIVER — EQUITY. A waiver, invalid because not in writing, of conditions contained in a lease for a term of years, may be treated as an equitable estoppel to enjoin a breach of the written instrument.

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Appeal from Wayne; Murfin, J. Submitted November 21, 1911. (Docket No. 150.) Decided January 23, 1912.

Bill by the Voigt Brewery Company against John Holtz for an injunction. From a decree dismissing the bill, complainant appeals. Affirmed.

Orla B. Taylor and *Charles F. Delbridge*, for complainant.

Clark, Lockwood, Bryant & Klein, for defendant.

STEERE, J. Complainant is a Michigan corporation located in the city of Detroit and engaged in the brewery business; the purchasers of its products being mostly saloon keepers in that city. The defendant is one of its customers, being the keeper of a saloon at Nos. 159 and 161 East Fort street, Detroit, which premises he occupies under a five-year lease from complainant, bearing date April 13, 1908.

This bill of complaint was filed on April 5, 1911, to enjoin defendant from violating the following clause in said lease:

"And as a further consideration, the party of the second part does hereby expressly covenant and promise to conduct and carry on in and upon said premises a saloon business in a respectable manner and to buy or cause to be bought of and from the said party of the first part, Voigt Brewery Company or its successors, and from no other person or persons, all the beer sold, used or consumed in and upon said premises in bulk as well as in bottles, and to pay or cause to be paid therefor on the delivery thereof its regular market price. The party of the first (part) or its representative shall have the right to inspect any and every part of the premises at any reasonable hour."

A preliminary writ of injunction was granted according to the prayer therefor in complainant's bill, but on final hearing the trial court held that complainant had an

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adequate remedy by either summary proceedings before a commissioner, which it had already instituted, or in an action at law for damages, basing his decision squarely upon the case of *Hardy* v. *Allegan Circuit Judge*, 147 Mich. 594 (111 N. W. 166, 10 L. R. A. [N. S.] 474, 118 Am. St. Rep. 557), and dismissed said bill.

On March 21, 1911, about two weeks prior to the filing of this bill, complainant obtained a judgment of restitution before a circuit court commissioner, under statutory, summary proceedings, from which judgment defendant appealed to the circuit court, giving the usual bond for payment of rent.

It appears that at the time of making the lease in question, and for some time before, defendant was owner of a property at the corner of Forest and Wabash avenues, in Detroit, where he was engaged in running a saloon. This property he leased to complainant, and transferred his business to Fort street, occupying the same originally under a parol lease, engaged in running a saloon, grocery, and meat market business combined; the parties in effect exchanging the use of their two locations. This arrangement was continued by a subsequent exchange of leases A and B; the dates, rate of rent, and term of years being the same in each lease. Each party, therefore, became both landlord and tenant of the other, and each still has possession of the property leased from the other. This controversy, however, only directly relates to defendant's conduct of his business under complainant's lease to him. He admits that he has not fully complied with its terms in the particular that he has, since July 10, 1910, bought from wholesalers, other than complainant, some of the beer sold by him in the saloon conducted on said premises.

It is his claim that on said date a supplemental agreement was made relaxing the restrictive clause in his lease, authorizing him to purchase and retail other kinds of beer, to meet the existing demands of his trade. His evidence shows that after he went to Fort street the character of the surrounding population changed from German,

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French, and English speaking people to an Italian community, affecting his trade detrimentally, to the extent that he was forced to give up the meat and grocery business which he had conducted in connection with his saloon, and that the tastes and demands of many of his new customers were for other kinds of beer than that made by complainant; that, as a result of such developed conditions, he, on July 10, 1910, had an interview with Mr. Voigt, the president and general manager of complainant, in which he informed Mr. Voigt fully of the situation, told him that he could not, under existing conditions, profitably continue even the saloon business, and that he intended to quit, proposing in that connection to sell to complainant his fixtures; that, as a result of such talk and negotiations on that subject, Mr. Voigt prevailed on him to continue his saloon, and authorized him to buy from other dealers, and retail to his trade, other kinds of beer, when there was a demand for it, telling him to push the Voigt beer, but to give customers what they wanted when they called for it; that he accordingly did continue his saloon business, dispensing some Tivoli, Pabst, and Stroh beers, which he bought from the manufacturers, but only when called for, giving his customers Voigt beer, unless they expressed other preferences; that what he sold of other brands was mostly bottled beer, and the amount sold, between July 10, 1910, and the commencement of this suit, would not exceed in value the sum of $50.

Mr. Voigt, in his testimony, admitted such conversation and notice given to him as to a change in the character of the business in that locality, together with defendant's declaration of intention to abandon the business as unprofitable; that as a result concessions were made relative to the sale of other beer, but he claims that this took place in September, 1910, and permission was only given to sell Tivoli beer in bottles.

The undisputed evidence shows that after July 10, 1910, defendant was openly dispensing, when called for,

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other beer than complainant's, and that Mr. Voigt was well aware of it, having himself drank other brands of beer in the place. The testimony discloses no objections made during the summer, or until about the time summary proceedings were instituted to oust defendant. The testimony shows conclusively that under the changed conditions complained of by defendant, and known to complainants, permission was given to dispense other brands of beer, as an inducement for defendant to continue the business. The date and exact scope of that permission is in dispute.

It is the claim of complainant that whatever concessions may have been made, they were oral, gratuitous and void under the statute of frauds, the conditions as to the sale of complainant's beer being in writing, not to be performed within a year and in connection with the transfer of real estate interests; that summary proceedings to oust defendant or an action to recover damages for breach of contract do not furnish an adequate remedy at law, the defendant having appealed from the judgment in the summary proceedings, and being yet in possession of the property, conducting his business in violation of the conditions of his lease, and that in the very nature of things it would be impossible to ascertain, in a suit to recover damages, how much more of complainant's beer would have been sold providing defendant sold no other beer.

It is the claim of defendant that a waiver of the condition in his said lease was made under such circumstances as to constitute a binding agreement, based on a valid consideration, maintainable in a court of chancery; that complainant has an adequate remedy at law and has elected its remedy by declaring the lease forfeited and instituting summary proceedings to regain possession of the property; that the condition is void for want of mutuality, and the contract, being in restraint of trade, is against sound public policy.

A parol waiver of the conditions in a written lease for a term of years, which would be invalid if unwritten, can-

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not be enforced in a court of law; but, considered in a court of chancery, this permission, given to defendant by complainant, to ignore the strict terms of his lease, and sell other beer when it was called for, to meet the demands of the trade and bolster up a declining business, in which complainant's beer is the chief commodity, if acted upon and carried out in good faith, points strongly to an equitable estoppel, where an injunction is asked which would operate, to all intents and purposes, as a decree for specific performance.

Taking the evidence of defendant as true, and it is undisputed, the injury complained of is neither irreparable nor great. From July 10, 1910, to the time of filing this bill, the other beer bought by defendant, including 3 barrels in bulk, did not exceed $50 in value, during which time he bought one-half barrel per day of complainant's beer. For 26 days in the month that would amount to 13 barrels, or 130 barrels for the 10 months. He pushed the sale of complainant's beer, and only bought and sold other brands as the exigencies of his trade demanded.

In the cases cited by complainant's counsel, where injunctions were granted for breach of similar lease conditions, the violations were hostile, extensive, and inexcusable, without color of right or equitable circumstances.

Counsel for complainant urge that the issue now before us was not involved in *Hardy* v. *Allegan Circuit Judge*, 147 Mich. 594 (111 N. W. 166, 10 L. R. A. [N. S.] 474, 118 Am. St. Rep. 557), by which the trial court was governed in dismissing the bill, and point out the distinction that in said case the brewing company was not the owner or lessor of the premises to which the covenant related, but only a mortgagor, the court properly ruling that equity would not enjoin selling beer contrary to the terms of the mortgage, as the contract was purely personal and such sales would not lessen the mortgage security, while in the case at bar complainant is lessor of the premises, and the covenant appertains to land, thus giving the right of injunction to restrain violation of conditions relative to its use.

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It is manifest that the *Hardy Case* is to be distinguished from the one at bar in the particular mentioned, and, had the decision been confined to, and based on, that reason, it would not be of controlling importance here; but the court held, as a further ground for the decision, that a court of equity will not interfere where the interest of complainant in a breach of covenant involves only profits in beer sold on the premises, but leaves the aggrieved party to his remedy at law, which is adequate.

As controlling precedents which should govern the disposition of this case, counsel for complainant cite and rely on the cases of *Ferris* v. *Brewing Co.*, 155 Ind. 539 (58 N. E. 701, 52 L. R. A. 305), and *Schlitz Brewing Co.* v. *Nielsen*, 77 Neb. 868 (110 N. W. 746, 8 L. R. A. [N. S.] 494). Those cases squarely hold that injunction will be granted to restrain breach of covenant in a lease where a lessee has contracted to sell no other beer on the leased premises than that manufactured by a designated company; applying to a particular article, handled in a particular business the general rule that a covenant by a lessee not to carry on a particular business, or not to carry on any business, except the certain one named, upon leased premises, is binding, and a violation thereof may be restrained by injunction. The *Hardy Case* cannot be reconciled with these authorities, although it can be said that it might have been decided on grounds not in conflict with them.

In discussing certain cases analogous to those cited by complainant's counsel, among which was the *Ferris Case*, the court said:

"There is, however, this difference: That in each of these cases the restrictive covenant was inserted in a conveyance by the owner of the property. I doubt, however, if this difference distinguishes those cases from the case at bar; for there the injunction seems to have been sought and granted for no other purpose than to insure to a brewer the profits from the sale of his beer."

"Such covenants are enforced by injunction, because their breach tends to the destruction of a business, and

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the remedy at law for damages is therefore inadequate. The reasoning does not apply where the damages are the profits of the beer sold on the premises."

The court further said:

"We may profitably consider the consequences, if courts enjoin the breach of such contracts. If the court enforce by injunction the agreement of an owner of property that there shall not be sold thereon the products of any rival of a certain manufacturer or dealer, it thereby stamps what is equivalent to a trust upon that property, and gives manufacturers and dealers a power to place fetters on individual and industrial freedom which self-interest will impel them to use for their own aggrandizement. The protection of their own interest does not require that they should possess any such extraordinary power, for their remedy at law for damages is entirely adequate. I think reason and authority, and the best interests of society, require us to say that they must be content with that remedy."

The undisputed testimony shows that complainant had secured a lease of the property in question, to re-lease it to the defendant, paying the same rent it received from him; the deal working out by the exchange of leases, as heretofore stated. Mr. Voigt testifies that the main consideration of complainant was the selling of its beer in the place, "because we only rent such places to sell our beer." The damages involved are the profits of the beer sold on the premises.

This court is not committed to the rule that a court of chancery will interfere by injunction, which must necessarily operate as a decree for specific performance, to enforce contracts to sell a particular brand of beer, where the only purpose is to insure a brewer his profits arising from such sale. To do so would be for the court to undertake the work of supervising, directing, compelling the performance of, in effect governing by injunction, private contracts between parties engaged in the liquor traffic (a business by sufferance), which contracts might, and often do, extend over a term of years.

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Under the general equities of this case as disclosed by the testimony, which are not with complainant, and in harmony with the views expressed in the *Hardy Case*, we are constrained to hold that equitable relief should not be granted, and to leave complainant to the remedies provided by law.

The decree of dismissal is affirmed, with costs.

MOORE, MCALVAY, BROOKE, and BIRD, JJ., concurred.

HYATT *v.* GRAND RAPIDS BREWING CO.

LANDLORD AND TENANT — INTOXICATING LIQUORS — LEASE — CONSTRUCTION — LEGALITY.

Upon the adoption of prohibition under the local-option law, a lease of premises to be occupied for and by a saloon did not become void, in the absence of a warranty in the contract that the use of the premises for that purpose should be continuous throughout the term.

Error to Kent; Perkins, J. Submitted November 22, 1911. (Docket No. 166.) Decided January 23, 1912.

Assumpsit by Francis A. Hyatt against the Grand Rapids Brewing Company for rent due. A judgment for plaintiff on a verdict directed by the court is reviewed by defendant on writ of error. Affirmed.

Geo. E. & M. A. Nichols (*F. O. Eldred*, of counsel), for appellant.

William M. Smith, for appellee.

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On April 21, 1906, plaintiff rented to defendant a brick store building located in the city of St. Johns, Clinton county, for the term of four years from and after May 1, 1906, at an annual rental of $600 to be paid at the rate of $50 monthly in advance; the building "to be occupied for the purpose of operating and conducting a retail liquor business and saloon." Defendant so occupied the building and paid the rent therefor for two years. On April 15, 1908, the board of supervisors of Clinton county adopted a resolution prohibiting the sale of intoxicating liquors in that county, under the provisions of Act No. 207, Pub. Acts 1889 (2 Comp. Laws, § 5412 *et seq.*), from and after the 1st day of May, 1908. Thereupon and on May 4, 1908, defendant wrote plaintiff a letter in which it made a tender of the premises to plaintiff. On May 6, 1908, plaintiff wrote defendant declining to accept the premises and insisting upon the payment of the rent reserved in accordance with the terms of the lease. Defendant then sublet the premises to one Stormfeltz, who occupied them from July 20, 1908, to January 1, 1909. Defendant paid the rent up to May 1, 1909. On May 5, 1909, it wrote the following letter to plaintiff:

"GRAND RAPIDS, May 5, 1909.

"F. A. HYATT,
"St. Johns, Mich.

"*Dear Sir:* Enclosed find our check for $50 for April rent, building leased of you April 26, 1906, being unable to use this building for purpose rented we vacated said building and surrender herewith our rights and privileges under lease which we hereby cancel, as under local-option laws the lease is declared null and void. The keys are with Pardee & Schoenhals, whom we have instructed to turn the keys over to you.

"Yours truly,
"GRAND RAPIDS BREWING CO."

Defendant paid no rent thereafter, and at the expiration of the lease, one year later, plaintiff brought suit for the recovery of the amount thereof, $600, and interest, together with the sum of $130 which he claimed was due

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for injury to the premises. Upon the trial counsel for defendant conceded that, if plaintiff was entitled to recover at all, he would raise no question over the sum of $130 claimed as damages for injury to the premises. The trial judge then said:

"I think I will direct a verdict for the plaintiff for the amount claimed, under the concession of counsel with reference to damage for injury to the premises, and on the ground that the adoption of local-option in Clinton county taking effect May 1, 1908, did not relieve the defendant company from its obligations to carry out its terms of this contract."

Verdict for plaintiff was directed in the sum of $787.81. Defendant has brought the case to this court for review upon writ of error.

BROOKE, J. (*after stating the facts*). Counsel for appellant in his brief states that the assignments of error raise four points. We find it necessary to discuss but one, the first, which is set out as follows:

"Whether the court was right in holding that the adoption of local-option in Clinton county had no effect whatever to cancel or render void the lease, and that defendant remained liable under it just the same after the adoption of local-option as though it had never been adopted, and rendering a verdict for that reason."

It is the claim of appellant that this case is controlled by our decision in *Hooper* v. *Mueller*, 158 Mich. 595 (123 N. W. 24, 133 Am. St. Rep. 399). We think the cases are clearly distinguishable. In the *Hooper Case* the lessors not only agreed to lease a building, but to furnish for the lessees suitable bondsmen, and further covenanted that, in case they were unable to furnish such bondsmen, the lease should become void. The adoption of the "local-option law" made it impossible for the lessors to fulfill their part of the contract, and this court held that thereby the lease became void according to its terms.

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The instant case presents no such situation. Nowhere in the lease can there be found an undertaking on the part of the lessor that the lessee shall at all times during the continuance of the lease be legally able to operate a retail liquor business upon the premises; otherwise the lease to become void.

We are of opinion that the words in the lease, "to be occupied for the purpose of operating and conducting a retail liquor business and saloon," should be construed as permissive in character, rather than as a warranty on the part of the lessors that the premises could be legally so occupied throughout the term. We think the court may take judicial notice of the fact that the use of premises for the sale of liquor at retail is such a use as tends to injure the reputation of the property so used. In inserting in the lease the words quoted, the lessee doubtless desired to have it placed beyond peradventure that it might use the premises for the purpose named. Had it desired to secure such a warranty from the lessor, it would have been easy to provide in the lease for its avoidance upon the happening of the contingency which later made it impossible for it to sell liquor at retail in Clinton county. In making the contract it did, we must presume that it acted with a knowledge of the law.

That the use for which it stipulated in the lease might at any time become illegal was known to it. The so-called "local-option law" had been upon the statute books for many years, and many counties in the State had prohibited the sale of intoxicating liquors under its provisions. That such action in Clinton county was possible was, of course, known to the lessee. That it should have been apprehended, from the history of the liquor traffic in this State during the past 20 years, is clear. The lessee doubtless did so apprehend it, and yet it chose to enter upon a contract which did not provide for its avoidance upon the happening of the contingency plainly in view. The language used is, in our opinion, permissive and not restrictive. The premises demised could have been used for

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other than the specified purpose. Indeed, a portion of them were so used during all the time they were occupied under the lease, and all of them were so used during six months of the last year of occupancy. While the construction placed upon the contract by the lessee, as indicated by its use of the premises, is not controlling, it is not without force when the court is called upon to determine the meaning of the language used.

Upon the question here involved, the following cases may be consulted with profit: *Houston Ice & Brewing Co.* v. *Keenan*, 99 Tex. 79 (88 S. W. 197); *Lawrence* v. *White*, 131 Ga. 840 (63 S. E. 631, 19 L. R. A. [N. S.] 966); *Abadie* v. *Berges*, 41 La. Ann. 281 (6 South. 529); *Shreveport Ice & Brewing Co.* v. *Mandel Bros.*, 128 La. 814 (54 South. 831); *Koen* v. *Brewing Co.* (W. Va.), 70 S. E. 1098; *Hecht* v. *Coal Co.* (Wyo.), 113 Pac. 788 (34 L. R. A. [N. S.] 773); *Barghman* v. *Portman*, 14 S. W. 342, 12 Ky. Law Rep. 342; *O'Byrne* v. *Henley*, 161 Ala. 620 (50 South. 83, 23 L. R. A. [N. S.] 496; *Kerley* v. *Mayer*, 155 N. Y. 636 (49 N. E. 1099).

Having reached the conclusion above indicated upon this question, it becomes unnecessary to consider the other questions discussed in the brief of appellant.

The judgment is affirmed.

STEERE, MCALVAY, BLAIR, and BIRD, JJ., concurred.

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MACATAWA TRANSPORTATION CO. *v.* FIREMAN'S FUND INSURANCE CO.

1. INSURANCE—WORDS AND PHRASES—OUTSIDE.
   In a policy of insurance covering a gasoline launch, permission to store the boat "outside," when construed with the remainder of the policy and with the application, signified that the boat might be stored out from the shore in the waters of the adjacent bay.

2. SAME—MARINE INSURANCE—EXPOSING BUILDINGS.
   Under the terms of the policy providing that the distance to exposing buildings should be 500 feet, only such buildings as increased the danger because of the use of fire were intended. OSTRANDER and MCALVAY, JJ., dissenting.

3. SAME—STATUTES—BREACH OF CONDITION.
   Notwithstanding 2 Comp. Laws, § 5180, providing that no policy of fire insurance shall hereafter be declared void for the breach of any condition if the insurer has not been injured by such breach or the loss has not occurred by reason thereof, the policy became void for breach of a promissory warranty that the distance to exposing buildings should be 500 feet.

Error to Ottawa; Padgham, J. Submitted November 15, 1911. (Docket No. 21.) Decided January 30, 1912.

Assumpsit by the Macatawa Transportation Company against the Fireman's Fund Insurance Company upon a policy of marine insurance. Judgment for plaintiff. Defendant brings error. Reversed.

Gore & Harvey, for appellant.

Diekema & Kollen (*Arthur Van Duren*, of counsel), for appellee.

BLAIR, J. This is an action upon a marine insurance policy covering the gasoline launch Holiday. The survey contained the following:

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"55. Boat will probably be laid up and not in use from (season for which boat is to be in commission and for which insurance other than fire is to apply) October 1, 1908, to July 1, 1909. * * *

"58. Give location and describe fully the building in which the boat is contained while laid up. In water at Macatawa Bay.

"59. Give distance in feet to exposing buildings. 500 feet.

"I hereby make application for insurance on my gasoline power boat, and agree that the statements made above are true, and that during the continuance of the insurance to be written on this application (both of the original policy and any renewals thereof) the property shall be and remain in all respects as above set forth, and that the foregoing shall be deemed and taken as promissory warranties.

[Signed] "MACATAWA RESORT CO.,
"By S. A. MILLER, Prest.,
"By F. VAN RY, Master,
"At Chicago, Ill."

The policy contained, among other clauses, the following:

"Warranted that the vessel shall not be engaged in navigation from October 1st to June 1st, and that when laid up and out of commission, shall be safely stored at outside," etc.

"Privileged to lay up either afloat or ashore. * * *

"This insurance is accepted by the assurers, and this policy is issued on the written application of the owner, now on file in the office of the assurers, which application is warranted by the assured to be true, and is accepted by both the assured and assurers as a part of this policy.

"Countersigned at St. Joseph, Mich., this 22nd day of June, 1908.

"CHAS. A. NEWTON & CO., Fireman's Fund. ———,
"Agent."

The boat was laid up in September in one of the 12 stalls of the plaintiff's boathouse, where she was either fired by an incendiary or by spontaneous combustion, and almost totally destroyed during the early morning hours of September 19, 1908. The boat was removed from the shed

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and beached, and no part of the shed took fire. The boat-house was 15 feet from the shore and in comparatively deep water. Defendant gave notice of special defense that plaintiff violated the warranties above quoted as to the location of the boat and as to the distance from exposing buildings. At the close of the testimony, defendant's counsel moved for an instructed verdict, which was denied, the case submitted to the jury, and verdict rendered for plaintiff for the agreed amount of the loss. Defendant insists that it was entitled to an instructed verdict for the reason that the policy was avoided by the continuing breach of the promissory warranties as to location and exposures.

Concerning the warranty as to location, the court instructed the jury that there was no breach, and this instruction raises one of the important questions in the case. Defendant's counsel contend that:

"'Outside' is a plain stipulation that the property should be stored outside of any shed or building."

In considering the meaning to be given to the word "outside," as used in the policy, the policy and application must be read together. The word is not used in the application, and the only reference to the location is in answer to question 58, which asks for the location and description of the building in which the boat will be laid up. Applying the answer to the question, it is that the boat while laid up will be in a building in water at Macatawa Bay. The printed policy grants the privilege "to lay up either afloat or ashore," and the written word "outside" after the printed words "shall be safely stored at," when construed in the light of the application, naturally signifies that the boat was to be stored outside of the shore, as she actually was stored "afloat" in the waters of Macatawa Bay and outside of the shore.

Concerning the warranty as to exposing buildings, the court charged the jury as follows:

"I charge you that what is meant by the word 'expos-

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ing' or 'exposure' as used in insurance matters means openness to danger, accessibility to anything that may affect especially detrimentally. The words 'exposing buildings' mean buildings erected and occupied for the use therein of dangerous elements, as fire, whereby the exposure is increased.

"A building *per se*—that is, a building in itself—is not an exposing building.

"It is the use to which the building is put that determines whether or not it is an exposing building; and if you find that at the time of the burning of the Holiday, this launch, there was no building within five hundred feet erected and occupied for the use therein of dangerous element, as fire, and where such dangerous element was used, there was no exposing building within five hundred feet, and the terms of the application and policy were not violated in that respect. Now that is a question for you to say, whether there is any proof in this case to show, under the definition that I have given you of 'exposing buildings' that there were any exposing buildings within five hundred feet; that is a question for you to determine, whether the buildings you have heard spoken of here, under the definition I have given you of exposing buildings, did increase the danger, or were any element of danger under the meaning of this term here 'exposing buildings.'"

We regard this instruction as a correct exposition of the law as applied to the contract of the parties in this case. The question in the application did not require the distance in feet to all buildings, but only to "exposing buildings," which would tend to increase the risk and might naturally be considered in fixing the rate. *Burleigh* v. *Insurance Co.*, 90 N. Y. 220; *Davis* v. *Insurance Co.*, 81 Iowa, 496 (46 N. W. 1073, 10 L. A. R. 359, 25 Am. St. Rep. 509); *Wilson* v. *Insurance Co.*, 29 U. C. C. P. 308.

The court further instructed the jury as follows:

"Counsel has stated to you something with reference to the statute in this State, being section 5180 of Miller's Compiled Laws of 1897. This statute provides that no policy of fire insurance shall hereafter be declared void by an insurance company for the breach of any condition of

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the policy if the insurance company has not been injured by such breach or where such loss has not occurred during such breach and by reason of such breach of condition; and I charge you that to prevent a recovery on the part of the plaintiff in this case it is not only necessary for you to find that said boat was laid up within five hundred feet of an exposing building, but you must further find that the insurance company has been injured thereby, or that the loss has occurred while said boat was so laid up and by reason thereof."

We are satisfied that where, as in this case, there is a continuing promissory warranty, the rule laid down by this court in *King* v. *Insurance Co.*, 140 Mich. 258 (103 N. W. 616), applies.

Under this rule, if there were exposing buildings within 500 feet at the time the Holiday burned, the policy would be avoided, regardless of the fact that such exposing buildings had clearly no influence upon the loss. If, however, there were exposing buildings at the time the boat was laid up, and they had ceased to be exposing buildings at the time of the fire, the statute would apply. Whether any of the buildings within 500 feet were exposing buildings, as defined by the court, at the time the Holiday was burned, should not be difficult of determination upon another trial.

The judgment is reversed, and a new trial ordered.

MOORE, C. J., and STEERE, BROOKE, and STONE, JJ., concurred.

OSTRANDER, J. The president of plaintiff testified that within 250 feet of the boathouse in which the launch was laid up there were five or six boathouses, constructed of wood, in size 30x18 or 30x16 feet. The boathouse of the plaintiff was constructed of wood. He further testified that the engine or power house of plaintiff was about 60 or 70 feet away, the icehouse 50 or 60 feet away, the interurban freight depot 40 or 45 feet away, and five cottages were within 250 feet. It is said in the brief for plaintiff

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that it was not possible to place the launch 500 feet away from any building, on the shore or in the water, upon the property of plaintiff or adjacent to it. The promissory warranty given with the application for the policy was in effect that there were no exposing buildings within 500 feet. Under the definitions and instructions given by the court, the jury found there was no breach of the warranty. Referring to the case of *Burleigh* v. *Insurance Co.*, 90 N. Y. 220, cited in the opinion of Mr. Justice BLAIR, it will appear that the warranty was that the insured building was "detached at least one hundred feet." It was said:

"The brevity of the language requires that something be added to complete and elucidate the meaning. The phrase may mean detached one hundred feet from any other building whatever its size or character. This would be a rigorous and severe interpretation, most favorable to the insurer and operating harshly upon the insured. So construed, it would make anything which could be deemed a building, however small or insignificant, as an icehouse, or privy, or open shed, within the prescribed distance, operate as a breach of the warranty. If a construction so literal or severe is intended by the insurer, he should at least say so by apt and appropriate language, and not ask the courts to supply it by intendment. If it be granted that such small and insignificant structures were not meant and should be treated as if they did not exist, the question would remain how small and how insignificant must they be to be disregarded, and how large and of what character to justify a conclusion of breach of the warranty, and where and upon what principles is the line to be drawn between buildings strictly such, but proper to be disregarded, and those whose presence breaks the warranty. These questions can be wisely answered in but one way. The test must be whether the building within the distance named is or is not an exposure which increases the risk. One which does not can scarcely be supposed to come within the warranty, unless such result is indicated by explicit language which will bear no other reasonable interpretation. No such language is contained in these policies, and when the courts are asked to supply a defect and complete an imperfect phrase, they should remember

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that the necessity is the fault of the insurer, and construe the language in view of the natural understanding of the parties, and with justice to both. Declining to hold the phrase in the policy to be meaningless and void, we are compelled to choose between two constructions; the one rigorous and hard and producing a forfeiture, and the other natural and reasonable and supporting the obligation. We have heretofore decided that in such case the latter construction is to be preferred. (*Baley* v. *Insurance Co.*, 80 N. Y. 21 [36 Am. Rep. 570]). We hold, therefore, that the warranty in this case was that no other building, of such size and character as to constitute an exposure and increase the risk, stood within one hundred feet of the storehouse."

The case of *Wilson* v. *Insurance Co.*, 29 U. C. C. P. 308, was determined upon the point that there was no warranty. In *Davis* v. *Insurance Co.*, 81 Iowa, 496 (46 N. W. 1073, 10 L. R. A. 359, 25 Am. St. Rep. 509), the policy was to become void if there "be any change in the exposure by the erection or occupation of adjacent buildings, or by any means whatever in the control or knowledge of the assured." The policy covered corn in cribs. The assured caused or permitted a corn sheller, operated by steam power, to be placed near the cribs and used to shell the corn. In its use fire was communicated to the cribs. The trial court instructed the jury that the exposure referred to in the policy—

"In order to avoid the policy, must be by the erection or occupancy of an adjacent building, or by some means of like character; that is, some permanent erection or structure must have been placed in proximity to the crib which contained the corn, or the occupancy of some building standing at the time the policy was issued, adjacent to the said crib, must have been changed so as to increase the hazard."

There was the further specific instruction that the use of the corn sheller was not within the prohibitory clause of the policy. In holding the instruction to be erroneous, and in construing the policy, it is said that exposure from "the erection or occupation of adjacent buildings" is

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especially prohibited by specific language; exposure "by any means whatever" by general language.

"The condition of the policy under consideration is against exposures. The erection or occupation of adjacent buildings is specially named, as causes producing exposure. In the general language, exposures, 'by any other means whatever within the control or knowledge of the assured,' are forbidden. The special words forbid 'the erection and occupation of adjacent buildings' so as to change or increase the exposure. If they are erected and occupied for the use therein of dangerous elements, as fire, the exposure is increased. Now it is the use of the element of fire, or other dangerous thing, that is provided against. It is plain that the buildings *per se* are not exposures, and it is equally plain that anything which causes the use of fire or other dangerous elements, by which a building is made an exposure, is *ejusdem generis*. The rule as applicable to this case does not mean that the cause of an exposure, contemplated by the general words of the condition, shall be buildings or something of the same nature or character, but shall be *ejusdem generis*, of the same nature, kind, or character, in causing exposure to fire. In our opinion the condition of the contract has not regard to the form, substance, use, or character of the thing creating the exposure. But anything in which fire is used so as to be dangerous, or any occupation when it is so used, or any acts, habits, or customs endangering the insured property, which are within the control or knowledge of assured, causes an exposure within the meaning of the conditions of the policy under consideration."

In the case at bar, the assured was asked to "give distance in feet to exposing buildings." It seems to me there could have been no misunderstanding of the meaning and purpose of the question. It means how near to the property at risk were there buildings which in their size and character exposed the risk, made it less safe, might communicate fire to it if they burned. The parties were bargaining for indemnity against loss by fire. The information asked for was "how will the risk stand with reference to exposures to fire from other buildings." The information given was that there are no buildings within

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500 feet of such size and character as to expose the risk to hazard if they shall burn. This is the idea conveyed to my mind by the decision in *Burleigh* v. *Insurance Co.*, *supra*. To say that a barn constructed of wood, filled with combustible material, does not expose an adjacent dwelling, or barn, when the chances of loss by fire are considered, would be to state what no man believes. So, if a factory building, constructed of wood, in which no fire was ever permitted to enter, stood near a dwelling or another factory. Upon this point I am impressed that the learned trial judge was in error. I agree with my Brother BLAIR upon all other points. If the conclusions I have stated are sound, the judgment should be reversed and no new trial granted.

MCALVAY, J., concurred with OSTRANDER, J.

BIRD, J., did not sit.

LAYZELL v. J. H. SOMERS COAL CO.

MASTER AND SERVANT—COMPETENCY OF EMPLOYÉS—NEGLIGENCE—FELLOW-SERVANT—INCOMPETENT ENGINEER—MINES AND MINING.

Evidence offered to show the incompetency of an engineer employed in defendant's coal mine examined, and *held*, to require the direction of a verdict for defendant.

Error to Saginaw; Gage, J. Submitted April 11, 1911, (Docket No. 73.) Decided February 10, 1912.

Case by Charles Layzell against the J. H. Somers Coal

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Company, for personal injuries. Judgment for defendant. Plaintiff brings error. Affirmed.

F. E. Emerick and *W. J. Nash* (*James H. Davitt*, of counsel), for appellant.

Walter J. Lamson (*Fred L. Vandeveer*, of counsel), for appellee.

STONE, J. This case is before this court for the second time. When here before (156 Mich. 268–277 [117 N. W. 179, 120 N. W. 996]), the principal question discussed and considered was the construction of section 3 of Act No. 100 of the Public Acts of 1905, which provides—

"That only a competent and trustworthy engineer shall be permitted to operate the cages and hoisting devices in all coal mines of this State,"

—and a judgment entered on a directed verdict for the defendant was reversed, and a new trial ordered. The suit is brought to recover damages for personal injuries received by the plaintiff on account of the claimed negligence of the defendant. Defendant was operating a certain coal mine in St. Charles township, Saginaw county, on March 2, 1906; and had been for several years before. The injury sued for occurred on the date above stated at about 9:30 o'clock p. m. At the date named, and for some months prior thereto, the plaintiff was employed at the mine as a pumpman, and on the evening named he was required by his duties to go down into the mine. In company with his helper, named McDonald, plaintiff entered the cage at the top of the shaft, and it is claimed gave the proper signals to the man operating the levers in the engine room to be lowered into the mine. This operator, named Saunders, instead of manipulating the machinery so as to lower the cage into the mine, did exactly the opposite, and pulled the lever so as to cause the cage suddenly and violently to be elevated some thirty feet up into the tipple, whereby the occupants were dumped out, with the result that the plaintiff was seriously injured.

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The basis of the plaintiff's claim is that Saunders, who made the error causing the plaintiff's injury, as stated, was not a competent and trustworthy engineer, as required by the statute above referred to, and that the plaintiff did not assume the risk resulting from defendant's violation of this statute, and that Saunders' incompetency and untrustworthiness, as an engineer, caused plaintiff's injury. The defendant denied this, and also claimed that plaintiff was guilty of contributory negligence in getting into the cage at the time, and in the manner he did, and also in riding in the cage, because he had some previous knowledge, or information, that on prior occasions Saunders had improperly operated the cage. This record shows that the evidence took a wide range upon both of the main questions involved. We have not only read with great care the record before us, but we have also carefully examined the record in the case when it was in this court before. We are impressed with the fact that the record now here contains much more evidence than did the former record, tending to show the competency and trustworthiness of Saunders as an engineer. It is worthy of note that Saunders was not examined as a witness at all upon the former trial; neither was Phillips, the superintendent of defendant. The court submitted to the jury the above questions; *i. e.*, whether or not Saunders was a competent and trustworthy engineer, and whether the plaintiff was guilty of contributory negligence. The trial resulted in a verdict for the defendant, and the plaintiff has brought the case here, assigning error mainly upon the charge of the court on the subject of contributory negligence.

The trial having resulted as it did, we will first inquire whether there was any evidence of neglect to perform the statutory duty on the part of the defendant; for, if it shall turn out that the evidence did not warrant the submitting of the case to the jury because no such neglect or omission was shown, then the case should not be reversed, the

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proper result having been reached, unless other prejudicial error shall be discovered in the record.

The following evidence in the case appears to be uncontradicted. The witness Saunders testified that he was 56 years old; that he had had previous experience in engineering from the time he was 19 years old; that he had run stationary engines, hoisting engines, had hoisted coal, and that he was an engineer on a freight train and a passenger train on the Michigan Central Railroad; that he had run a locomotive six years between Detroit and Buffalo, on freight trains five years and passenger trains one year; that he also ran a fire engine in Toledo and Marion; that he worked in a stave and heading mill, and that at Toledo he had run an engine unloading ore out of vessels, where he had six levers to handle; that he started in millwork 12 miles east of Toledo and worked three years learning to be an engineer there, and was 19 years old when he started; that at St. Charles he helped the fireman, usually fired two boilers; that his work in the engine room was taking care of dynamo engines, keeping them oiled, taking care of the fan engine and suction pump, and did all that an engineer should do, and continued that work 18 months; that he frequently used the cages for lifting material and coal; that he had worked for A. T. Bliss at Lindennan 20 months, running an engine in a shingle mill; that he had papers as marine and stationary engineer when he went to work for defendant; that, while his eyesight was not very good, yet he had no trouble with the levers when he had a light, and that they always had a good light at the levers at the defendant's mine.

The witness C. F. Beecher testified, in substance, as follows:

"I reside in Ohio; am engineer in a coal mine; was formerly chief of the Somers mine at St. Charles, for six years, acted as hoisting engineer for three years. It was a part of my duties to look after the engineers and firemen of the different mines there, to see that they did their work properly. I hired and discharged them. I knew

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Saunders and William Rolfe. I hired Saunders, and inquired of Rolfe as to Saunders' ability as an engineer, whether he was competent and reliable, and as to his age. I said: 'We don't want a man that drinks or lays off here. We have got to have a steady man we can depend on.' And he told me the man was reliable and everything in that respect, and said he had several years engineer's experience. So the man came down and was put to work. He told me Saunders had run a locomotive, that he was a sober and steady man. * * * He was first put to firing on the tail end. He appeared to be a competent fireman. He worked at that three or four months. Then I advanced him. I stood and watched him run the cages, and showed him around the plant and engine and pumps, and everything that a man has to know in order to operate the plant. I instructed him relative to running the cages, and watched him until I was satisfied he thoroughly understood running the cages up and down. That was before I put him on as night engineer. That is the way they all learn. They start in at the tail end and run the cages when there is no one on, and practice on them. After I advanced him, I watched how he did his work, and, so far as I could see, everything was in good order. I rode down often with him, and at such times did not discover anything which would indicate that he was not competent to handle them. No one ever made a complaint to me that the man was not all right. I never knew or heard of his drinking liquor, and never saw him have liquor around, nor when he appeared to have been using liquor. Saunders was regular at his work, except when he was sick."

On cross-examination he testified as follows:

"I was a witness in the former trial. I now refer to Saunders as night engineer. In the other case I might have called him the head fireman. There are several things that make a man skillful and competent. He must be careful to exercise good judgment at all times and not act upon the impulse of the moment, and must realize that he is handling human lives."

John T. Phillips testified that in 1905 and 1906 he was with the defendant at St. Charles as superintendent of the mines there; that he had had experience all his life in mining in Ohio and other places; that his experience as

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such superintendent would lead him to observe and know of the men working around the engines, the operating of the levers, the raising and lowering of the cages, and so forth; that his work took him constantly around the mines; that he had occasionally operated the cages in coal mines himself; that the plaintiff had said to him before his injury that he was fully satisfied with Mr. Saunders, and thought he was a safe man to let him up and down the shaft; that he did object to another person, and suggested that Saunders take his place; that the witness made the change and informed Mr. Beecher, the chief engineer; that after that change Saunders was supposed to be head fireman, or assistant or night engineer; that he would have charge of the boiler room, hoisting and lowering the men; that the men could choose to use the cages or walk up and down the stairway; that they had a good safe stairway to go up and down if they wanted to walk; that witness had sent Saunders to operate the levers, and in his judgment Saunders operated them properly; that he was there after the accident the night it occurred, and he saw no evidence of liquor about Saunders, and never knew of liquor being about the mine; that the regular engineer hoists the coal because of his ability to run the cages steadily and screen the coal; that this was the most important thing about mining, when the engineer gets to the point in the dump so he can control the cage perfectly and screen the coal.

The witness J. O. Somers testified that in 1905 and 1906 he was at St. Charles with the defendant as general superintendent; that Mr. Phillips was assistant under the witness, and Beecher was chief engineer of the three mines; that the witness had had long experience in mining and knew Saunders; that, when he first knew Saunders, he was firing on the tail end; that, when the witness came back to assume charge in December, Saunders was on the head; that at the time of the accident, Saunders was head fireman and night engineer in charge of the engine; that Saunders did that work 15 or 18 months before

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the accident; that witness was frequently at the mine during that time, and frequently on the cage with Saunders handling the levers—once every night for a week.

"He was all right in handling the levers. I didn't observe anything wrong. * * * No one ever made complaint to me about Saunders. I spent all my time around these mines and mingled with the men. Never saw or heard of Saunders using liquor. After the accident, Saunders was laid off for punishment."

In the light of this record it does not appear to us that the plaintiff made out a case that warranted him in going to the jury upon the question of the incompetency and untrustworthiness of Saunders as an engineer. After he was employed, his qualifications as an engineer were carefully inquired into. He was instructed as to the workings of defendant's plant, and how to manage and operate the cages. It appears that for 18 months prior to the accident he occupied the position of night engineer at defendant's mine, where the accident happened. It will be noted that this accident occurred at night. Mining was not conducted except during the daytime. The salt pumps were kept in operation, and men went down to look after them at night. The hoisting and lowering of these men and keeping the engines and pumps in operation were all that was required. Saunders' work as such engineer was to take care of the dynamo engine, the fan engine, the suction pump, raise and lower the men, and such other work as was required during the night when mining was not being done. During this entire period not a word of complaint was made against him to any of the officers, master mechanic, superintendent, or pit boss as to his habits or character as a man or an engineer. The plaintiff does not claim that he made any complaint of the alleged incompetency or untrustworthiness of Saunders, but testified that he would rather be discharged than do so. While he was acting as engineer at this mine, Mr. Somers, the superintendent, Mr. Phillips, assistant superintendent, Mr. Beecher, master mechanic, and Mr. Jenkins,

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the mine foreman, frequently rode on the cage when it was operated by Saunders, and each one of these witnesses testified, without contradiction, that there never was anything amiss with him as an engineer to their knowledge or information; and that they were never told by any one that he was otherwise than a competent and trustworthy engineer.

We are led to the conclusion that the trial court would have been warranted in directing a verdict for the defendant upon this record. That being so, the other errors complained of were without prejudice to the plaintiff; and, the trial having resulted in a verdict and judgment for the defendant, we are satisfied with the result, and find no prejudicial error in the record.

The judgment of the court below is affirmed.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, and OSTRANDER, JJ., concurred.

BIRD, J., did not sit.

INGERSOLL *v.* DETROIT & MACKINAC RAILWAY CO.

1. RAILROADS—MASTER AND SERVANT—LOGGING ROADS.
   On a spur used for logging purposes less than twelve miles in length, having no switches, stations, or regular stopping places, telephones, telegraph, or schedule trains, the general rules in use for the operation and maintenance of main lines of railroad are impracticable and inapplicable.

2. SAME—NEGLIGENCE—RISKS ASSUMED—DIRECTING VERDICT.
   It was error, in an action for the death of a railroad employé, killed in a collision between a work train on which he was riding along such spur or branch line, with a loaded car left

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on the track, at night, to refuse to charge the jury that the notice and warning possessed by plaintiff's decedent, relative to the conditions and system of operating the branch line, and the custom of leaving cars on the line without lights or warning signals, barred plaintiff's recovery.

Error to Ogemaw; Sharpe, J. Submitted June 20, 1911. (Docket No. 42.) Decided February 10, 1912.

Case by Elbert V. Ingersoll, as administrator of the estate of William Quigley, deceased, against the Detroit & Mackinac Railway Company for the wrongful killing of decedent. Judgment for plaintiff. Defendant brings error. Reversed and no new trial ordered.

For previous decision in this case, see *Ingersoll* v. *Railway Co.*, 163 Mich. 269 (134 N. W. 441).

Charles R. Henry and *Guy D. Henry* (*James McNamara*, of counsel), for appellant.

Hall, DeFoe & Henry, for appellee.

MCALVAY, J. This suit was brought to recover damages for the death of plaintiff's decedent, claimed to have been caused by the negligence of defendant. The facts of the case are as follows: Plaintiff's decedent, William Quigley, was on November 6, 1906, at work as a brakeman for defendant company on a spur branch of its railroad known as Gates' branch, which extended from a station on its main line called South Branch, into the timber towards the north about 10 or 12 miles. The sole purpose of this spur track was to bring out forest products to the main line, and on it no regular trains or trains of any kind were operated according to any schedule or timetable. This spur track was connected with the main line by a switch and all along its line it had been customary at any time, when requested, to take in cars which had been ordered for loading, and place them at any place where the person ordering the car might designate. It

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was a single track its entire length, except at one place towards the upper end where there was a switch. There were loading grounds wherever the forest's products might be placed throughout its entire length. This placing of cars for loading was usually done by the freight engine and crew which ran a freight train regularly between Rose City and Emery Junction on the main line. On the day when the accident occurred, a gondola car which had been ordered was placed on this track for the man who had ordered it for loading, and it had been loaded with mine props and left on this track. The loading had been finished about 4 o'clock in the afternoon. It appears that it had always been the custom to leave cars along this track without lights or other warning, and this car had no lights or warning, upon or near it to indicate its presence.

On this day the work train and construction crew had been engaged in extending this spur track further north towards a mill, and had been so employed for two or more days. This work train contained cars for sleeping and eating accommodations for the construction men and train crew, and for the purpose of keeping them supplied with food it was necessary to go to South Branch for supplies. The engine tender and way car were making a trip for this purpose at the time of this accident. The way car was being pushed by the engine which was headed towards South Branch. This could have been changed when this one switch was reached and the engine and tender placed ahead, but it was decided before starting that the engine should push the way car the entire distance. Plaintiff's decedent had ridden down with this train with the cars in the same order two days before when loaded cars were found on the track and taken to South Branch. He also knew that while they were extending the branch, cars would from time to time be put in on this track as usual. On the night in question he was told by the engineer who was in charge of the train to keep a sharp lookout for cars or anything else on the

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track. He rode on the platform in front of the way car with a hand lantern, acting as a lookout for cars on the track, and had signaled when they left camp, and gave the signal to back up. His signal could be seen from the engine. The train was going between five and eight miles an hour. Mr. Wrobleski, the foreman of the construction men, was also at the time riding on the platform with deceased. The record shows that on this evening it was not very dark; that one on lookout with a lantern could see several car lengths ahead; also, that some light was given by the headlight of the engine, which was immediately behind the way car, shining through the windows in each end of the car. This train had proceeded two or three miles when without notice or warning of the approaching danger from the lookout to the fireman or engineer the front end of the way car struck the loaded gondola. Plaintiff's decedent was crushed, and died a few days later from the injuries he received.

The trial resulted in a verdict for plaintiff, upon which a judgment was entered. Defendant asks this court for a reversal of this judgment, assigning errors upon certain rulings and instructions of the trial court during the trial.

The contentions of the defendant, are:

(1) That such a logging branch of a railroad as the one in this case is inherently different from a railroad in general use; that it does not come within the ordinary rules and principles governing main traveled lines of a commercial road; that a railroad company is not held to so great a degree of care to employés working upon such a branch as to those who work upon the main line of the road.

(2) That as a matter of law upon the undisputed facts in the case plaintiff cannot recover because of the contributory negligence of plaintiff's decedent.

(3) That plaintiff's decedent, because of his familiarity with the work, the instructions he had received, and the notice he had of existing conditions, assumed this as one of the risks of his employment.

The negligence relied upon by the plaintiff is not because of any unsafe condition of the track, but in leaving

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upon this track a loaded car without lights or other warning to notify the crew of the work train of its exact location. It is apparent that in case of a woods or logging spur like this Gates' branch, consisting of a single track without switches, running its entire length through practically a continuous loading ground, without stations or regular stopping places of any kind, without any regular trains or schedules, and without telephone or telegraph system or general rules or orders, and conducted in the manner and for the sole purpose as stated, the general rules applicable to the conduct of general railroads as to the degree of care to be used for the safety of employés cannot be applied. To require the same care obviously would be requiring the performance of the impossible. This court has several times held that railroad companies are not held liable to the same degree of care in maintaining their side tracks, as in maintaining their main lines. *Michigan Central R. Co.* v. *Austin*, 40 Mich. 250; *Batterson* v. *Railway Co.*, 53 Mich. 125 (18 N. W. 584); *Hewitt* v. *Railroad Co.*, 67 Mich. 61 (34 N. W. 659). In so doing the court has recognized a difference in importance and general uses between the main lines and the side tracks. Such distinction is all the more apparent when the difference between the uses and necessities of the main line of a railroad and a spur branch used only at irregular intervals for bringing out forest products is sharply presented as in this case.

It appears undisputed from this record that the universal custom and practice in operating trains upon spur branches similar to this one is wholly different from that upon main lines, and is identical with the manner in which this spur branch was operated; that it is customary to leave cars standing upon the track as in this case without lanterns or other markers upon them, without torpedoes or fuses on either side of them, all of which are usual and required upon lines with scheduled trains, stations, depots, etc. The reasons for such custom and practice are obvious. The cars are isolated in a region sparsely inhabited or

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entirely uninhabited. It would not be practicable to put men on to maintain flags, lanterns, and other markers or warnings along such a line, and without men so employed lights would go out, and other markers would be subject to removal and destruction. In the instant case it appears that plaintiff's decedent was informed and knew of these conditions from statements made in his presence and from personal experience shortly before the accident. It further appears that on the day in question with this knowledge of the conditions along the track he desired the train to be run in the order in which it did proceed, rather than to have the way car put behind the engine; that, before starting, he was charged by the engineer to look out for cars on the track, and then took his position where he was in full control of the situation. The dangers before him, of which it appears he knew, were incident to his employment. He gave the signals for starting and backing and the train proceeded. In so doing with full knowledge he assumed the risk of all such dangers incident to the employment which he knew to exist. *Harrison* v. *Railway*, 137 Mich. 78 (100 N. W. 451); *Bradburn* v. *Railroad Co.*, 134 Mich. 575 (96 N. W. 929). The court refused to charge, as requested, that this spur branch was not of such a character as required the same degree of care to employés operating it as to those employed on the main line, and that the notice and warning given to plaintiff's decedent was sufficient, and relieved defendant from liability.

The propositions contained in such request are established in this case. Such spur lines are inherently different from the main lines, or those parts of railroads operated the same as main lines, and the reasons and conditions which require the ordinary rules and principles governing the latter relative to care of employés do not apply to the former. A system of warning and notice of dangers to its operatives had been adopted, which appears to have conformed with the general custom and practice upon branches

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of this character, and commensurate with the requirements of the business. The request was warranted upon the undisputed facts, and the court was in error in refusing to give it.

The question of the contributory negligence of plaintiff's decedent need not be considered.

The judgment is reversed, and no new trial granted.

By a stipulation STONE, J., is substituted for the late HOOKER, J., who sat in the case.

MOORE, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

CASHIN *v.* PLITER.

1. CONTRACTS—LEGALITY—FRAUD—VIOLATION OF CRIMINAL STATUTE.

   Since the object of Act No. 101, Pub. Acts 1907, is to protect the public from fraud and to provide a means of ascertaining the identity of the owners of a business conducted under a fictitious or trade name, and a violation of its terms is forbidden under penalty, a contract made by a partnership engaged in contracting, etc., under a fictitious name without filing in the office of the county clerk a certificate showing the names of the members of such firm, was unenforceable in behalf of the partnership because tainted with illegality.

2. SAME—PARTNERSHIP—INNOCENT PARTIES.

   As to innocent third parties who have dealt with the firm in ignorance of any illegality, the statute does not take away their rights.

3. SAME—IMPLIED CONTRACTS—COMMON COUNTS.

   The statute equally precludes a recovery under the common counts for materials furnished by the copartners without complying with the law.

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4. SAME.

When an agreement has been expressed the law cannot imply one.

Error to Genesee; Wisner, J. Submitted October 18, 1911. (Docket No. 122.) Decided February 10, 1912.

Assumpsit by McArthur Cashin and Charles Narron copartners as the Flint Construction & Realty Company, against William C. Pliter for materials furnished and for work and labor performed. A judgment for defendant on a verdict directed by the court is reviewed by plaintiffs on writ of error. Affirmed.

Farley & Selby (*William V. Smith*, of counsel), for appellants.

Clifford A. Bishop, for appellee.

STEERE, J. In this case a verdict was directed in favor of defendant, for the reason that the contract sued upon was void under Act No. 101, Pub. Acts 1907; the same being entitled "An act to regulate the carrying on of business under an assumed or fictitious name."

This act prohibits the conduct or transaction of any business in this State under an assumed name, or any other than the real name of each individual owning or conducting the same, unless such person or persons shall acknowledge and file in the office of the clerk of the county in which the business is or is to be conducted, or an office maintained, a certificate setting forth the name under which such business is or is to be conducted, and setting forth the real name of each of the owners of such business, together with the residence and post office address of each of said owners. A copy of such certificate is made evidence of the facts therein contained in courts of law in this State. Violation of the requirements of this act is declared a misdemeanor, punishable by fine and imprisonment.

The declaration alleges in the first count that plaintiffs

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are a copartnership, doing business under the firm name of Flint Construction & Realty Company; that on March 14, 1910, plaintiffs, "under the firm name of Flint Construction & Realty Company," entered into a written contract with defendant to build him a house in the city of Flint for the sum of $825; that the same is fully performed and the house finished; that there is a balance due on said contract which defendant refuses to pay. A copy of said contract is attached to and made a part of the declaration. The declaration also contains the common counts. Defendant's plea was the general issue.

At the trial plaintiffs proved that they were engaged in the building and contracting business in the city of Flint in 1910, with offices in the National Bank building in that city, doing business as copartners under the name of the Flint Construction & Realty Company; that as such copartners, and under such name, they entered into a certain contract, in writing, with defendant to build a house for him. The contract was identified and offered in evidence. No proof was made or offered that plaintiffs had complied with the requirements of said Act No. 101. The contract was objected to, and timely objection was also made to all other evidence offered in support of the allegations in the declaration, on the ground that plaintiffs had not complied with the requirements of said act, and had been transacting business in violation thereof; that any contract so made under an assumed name was illegal and not enforceable. The objections were sustained. The court also held that plaintiffs were not entitled to recover under the common counts for labor and material furnished in the construction of said building, and, after the parties had rested, directed a verdict as stated. Plaintiffs made a motion for a new trial, which was denied.

The points presented on the motion for a new trial, and upon which error is assigned, are substantially the same as those urged and argued during the trial of the cause. Briefly stated they are: That said Act No. 101 is a penal act, not implying or intending any other punishment or

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loss to those violating it than that expressly provided by fine and imprisonment; that the act has no application in a case where defendant knows who comprise the members of the concern with which he deals, he being estopped by such knowledge; that, even if the contract be void, inasmuch as the same is fully performed, and defendant has benefited thereby, plaintiffs are entitled to recover, under the common counts, the reasonable value of material furnished and labor performed; and that said act is unconstitutional under section 21, art. 5, of the Constitution of this State.

The last objection is not discussed in appellants' brief, but is presented in the record. The one object of the act is manifestly to protect the public against imposition and fraud, prohibiting persons from concealing their identity by doing business under an assumed name, making it unlawful to use other than their real names in transacting business without a public record of who they are, available for use in courts, and to punish those who violate the prohibition. The object of this act is not limited to facilitating the collection of debts, or the protection of those giving credit to persons doing business under an assumed name. It is not unilateral in its application. It applies to debtor and creditor, contractor and contractee, alike. Parties doing business with those acting under an assumed name, whether they buy or sell, have a right, under the law, to know who they are, and who to hold responsible, in case the question of damages for failure to perform or breach of warranty should arise.

The general rule is well settled that, where statutes enacted to protect the public against fraud or imposition, or to safeguard the public health or morals, contain a prohibition and impose a penalty, all contracts in violation thereof are void. Pollock's Principles of Contract (7th Ed.), p. 293; *Drury* v. *Defontaine*, 1 Taunt. 131; *Myers* v. *Meinrath*, 101 Mass. 366 (3 Am. Rep. 368); *Lyon* v. *Strong*, 6 Vt. 219; *Harris* v. *Runnels*, 12 How. (U. S.) 79; *Gibbs* v. *Gas Co.*, 130 U. S. 396 (9 Sup. Ct. 553); *Miller*

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v. *Ammon*, 145 U. S. 421 (12 Sup. Ct. 884), and cases cited. This rule has been recognized and adopted in *Re Reidy's Estate*, 164 Mich. 167 (129 N. W. 196), wherein the following language is used:

"It is a well-settled principle of law that all contracts which are founded on an act prohibited by a statute under a penalty are void, although not expressly declared to be so."

It is urged that the *Reidy Case* can be distinguished from the one at bar in the particular that the former is directly aimed at a contract which the law prohibits in the interest of public health and safety; the decision being founded on public policy, to protect citizens against unlicensed and unskilled pharmacists and resultant hazard to human life. It is true that the object of the act in question is not to safeguard human life or health; but both laws are founded on public policy. They are acts of the same class, coming within the police power of the State; one being to protect the public health, and the other to protect the public from imposition and fraud. Each prohibits certain acts, and each makes the violation a criminal offense punishable by fine and imprisonment.

In interpreting the statute under consideration, it can be contended with reason, and in harmony with former decisions of this court construing acts somewhat analogous, we are inclined to the view, that it is not the intent to render a contract made in violation of this act absolutely null and void for every purpose. While, as heretofore stated, the general rule is well settled that a contract made in violation of a statute is void when the statute is otherwise silent, and contains nothing from which the contrary is to be inferred, nevertheless the diversity of legislation gives rise to varying exceptions to this rule; and before applying it in full the court should carefully scrutinize the particular statute under advisement, for the purpose of ascertaining, from the subject-matter and language used, the object for which it was enacted and the intent of its makers, to the end that such intent may be rendered effect-

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ual and the indicated purpose accomplished. As this act involves purely business transactions, and affects only money interests, we think it should be construed as rendering contracts made in violation of it unlawful and unenforceable at the instance of the offending party only, but not as designed to take away the rights of innocent parties who may have dealt with the offenders in ignorance of their having violated the statute.

In behalf of the plaintiffs, it is urged that, the contract having been performed and labor and material having been furnished, of which defendant retains the benefit, recovery can be had therefor under the common counts, on an implied promise to pay for the same what they are reasonably worth. But they were furnished under an illegal express contract, by virtue of which there can be no recovery. It is an elementary rule that, where there is an express agreement between parties covering the subject-matter, the law will not imply one. If we say that, the contract declared on being unenforceable, there was, as a matter of law, no contract, and so seek to imply one for the labor and materials furnished, then the implied contract, under the allegations of the declaration and proof offered, is not relieved of the infirmity; for plaintiffs furnished the labor and material and transacted the business under an assumed name in violation of law. Changing the name or form of pleading does not change the character of the illegal transaction; under whatever guise the claim is presented, its groundwork is a violation of the act. In such a case, the doctrine of estoppel cannot be invoked by the plaintiff; but the law leaves the parties where it finds them and refuses relief. It recognizes the defense of illegality, not as a protection to the defendant, but as a disability to the plaintiff. See *Inhabitants of Webster* v. *Sanborn*, 47 Me. 471; *Pangborn* v. *Westlake*, 36 Iowa, 546; *Jameson* v. *Carpenter*, 68 N. H. 62, 63 (36 Atl. 554); *Chattanooga Building & Loan Ass'n* v. *Denson*, 189 U. S. 408 (23 Sup. Ct. 630); 9 Cyc. p. 446, and numerous cases there cited.

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We are constrained to hold that the contract sued upon was illegal and unenforceable as to plaintiffs for the reasons above stated. The trial court correctly held that no recovery could be had under the special count or common counts of the declaration and the proof offered in that connection.

The judgment is affirmed.

MOORE, C. J., and BROOKE, STONE, and OSTRANDER, JJ., concurred.

TABINSKI *v.* A. HARVEY'S SONS MANUFACTURING CO.

1. MASTER AND SERVANT—INFANT—STATUTES—DUTY OF FACTORY INSPECTOR—CONCLUSIVENESS OF DETERMINATION.

   By the provisions of Act No. 285, Pub. Acts 1909, it was not intended by the legislature to constitute the factory inspector sole judge as to what employment is dangerous to the life and limb of a minor under eighteen years of age, hired and set at work prohibited by the act.

2. SAME—GEARING—WORDS AND PHRASES.

   Gearing, within the terms of such statute, includes cog wheels, whereby power is transmitted from one portion of a machine to another; exposed and unprotected gearing is within the meaning of the law requiring proper safeguards for all gearing and belting.[1]

3. SAME.

   Exposed gears were dangerous within the meaning of such act.

Error to Wayne; Hosmer, J. Submitted November 9, 1911. (Docket No. 76.) Decided February 10, 1912.

[1]What is comprehended in expression "machinery of every description," in statutes imposing duty on master as to placing guards, see note in 30 L. R. A. (N. S.) 36.

Common practice as the measure of master's duty to guard machinery, see note in 16 L. R. A. (N. S.) 140.

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Case by George Tabinski, by his next friend, against A. Harvey's Sons Manufacturing Company, Limited, for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry B. Graves, for appellant.

Thomas W. Payne (*George W. Coomer*, of counsel), for appellee.

Plaintiff, a young lad 14 years and 6 months of age, was injured while in the employ of the defendant, which is a manufacturer and wholesale dealer in plumbers' supplies. On the day of his injury, which was some six months after he started to work, he testified that he was set to work on a pipe-threading machine. After he had been so employed for about three hours, it appears that he went to another part of the shop for a drink of water. Returning, and when near the machine upon which he was working, he claims to have tripped over a valve lying upon the floor, and to have fallen upon the exposed gears or cogs of the machine. He lost three fingers of his left hand; the thumb and first finger remaining intact. A photograph of that part of the machine in which plaintiff received his injury appears on the page following.

Plaintiff brought his action under the provisions of Act No. 285 of the Public Acts of 1909, the applicable provisions of which are as follows:

"SEC. 11. No female under the age of 21 years, and no male under the age of 18 years shall be allowed to clean machinery while in motion, nor employed in or about any distillery, brewery or any other establishment where malt or alcoholic liquors are manufactured, packed, wrapped or bottled, nor in any other employment which may be considered dangerous to their lives and limbs or where their health may be injured or their morals depraved, nor shall females be unnecessarily required in any employment to remain standing constantly.

"SEC. 15. It shall be the duty of the owner of any factory, storehouse or warehouse, or his agent, superin-

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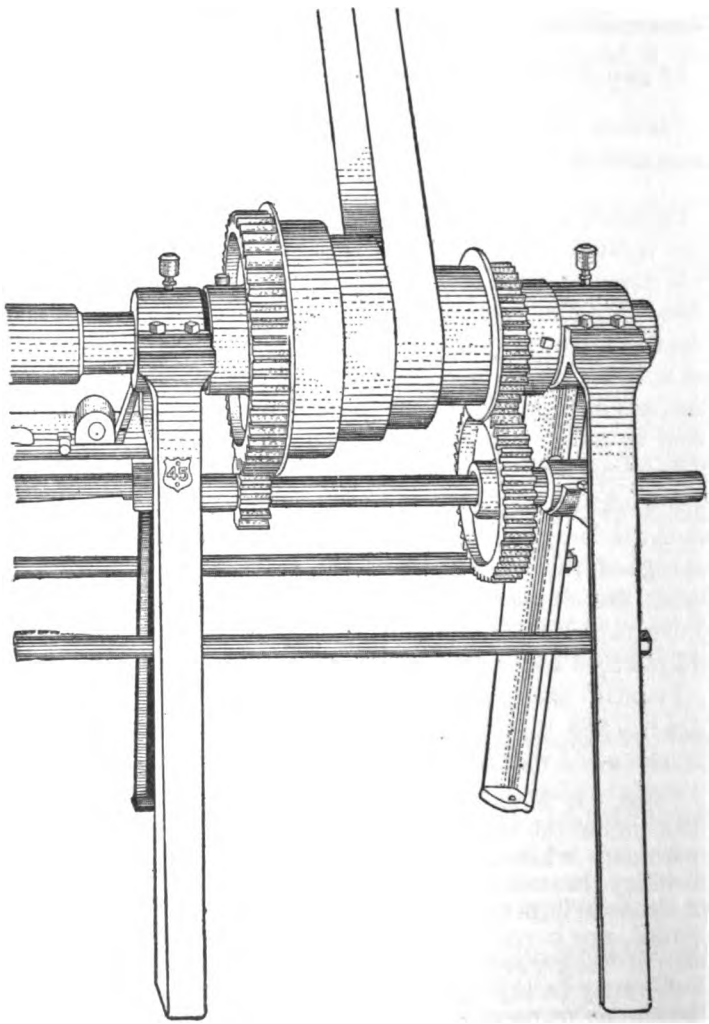
tendent or other person in charge of the same, to furnish or supply or cause to be furnished or supplied, in the discretion of the factory inspector, where machinery is in



use, proper shifters or other mechanical contrivances for the purpose of throwing belts on or off pulleys. All gearing or belting shall be provided with proper safeguards,

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and whenever possible machinery shall be provided with loose pulleys. All vats, saws, pans, planers, cogs, set-screws, gearing and machinery of every description shall be properly guarded when deemed necessary by the factory inspector."

Defendant offered evidence of experts tending to show that the machine in question was not considered dangerous to life and limb. It also offered the evidence of the deputy State factory inspector, from which it appears that he had inspected defendant's premises in the year 1909, and had made no order respecting this machine, because he did not consider the gears exposed.

The learned circuit judge submitted the case to the jury under instructions to the effect that, before plaintiff could recover he must show by a fair preponderance of the evidence, first, that he received the injury in the manner testified to by him; second, that he was guilty of no negligence contributing to his injury; third, that in placing the boy at work upon the machine in question defendant placed him at employment which might be considered dangerous, within the meaning of the language of the statute. Plaintiff recovered a judgment for $1,500. Defendant has brought the case to this court for review.

BROOKE, J. (*after stating the facts*). Three questions are stated and argued in the brief of counsel for defendant, as follows:

"*First.* Was the decision of the factory inspector conclusive?"

It is pointed out that the legislature of 1909, in passing Act No. 285, used language which, it is claimed by appellant, indicates an intention to make the factory inspector the sole judge as to what employment may be considered dangerous to life and limb; and that from his decision there is no appeal. This argument is based upon the fact that in Act No. 113, Pub. Acts 1901 (section 3), the words used are, "at employment whereby its life or limb is in danger," and in Act No. 169, Pub. Acts 1907, the words

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used are, "at employment whereby his or her life or limb is endangered," while in the statute of 1909 the words used are (section 11), "nor in any other employment which *may be considered* dangerous to their lives or limbs." A like argument is predicated upon the fact that the title of the act of 1909 is much broader than those of the acts preceding it. We are of opinion that the language "may be considered dangerous to life and limb" cannot be construed to imply that such consideration shall be indulged in by the factory inspector alone; and that his determination as to any given situation must be considered final.

We are, of course, unable to say what induced the legislature to change the wording of the law in this respect. The intention may have been simply to declare the law in conformity to decisions of this court, as under the earlier statutes it had been held that in doubtful cases the question as to whether a given employment was "dangerous to life or limb" was for the jury. *Braasch* v. *Stove Co.*, 147 Mich. 676 (111 N. W. 197); *Syneszewski* v. *Schmidt*, 153 Mich. 438 (116 N. W. 1107). In any event, we are satisfied that, by this enactment, the legislature did not intend to create an independent tribunal for the determination of this important question, from whose decision there should be no appeal.

It should, perhaps, be noted that in 1911 (Act No. 220) the language was again changed; the words used being "nor in any hazardous employment."

It seems to us sufficiently obvious that the controlling motive in all these enactments is to throw certain safeguards about young children who, by reason of their circumstances, are obliged to seek employment while yet immature and inexperienced. All employment is not prohibited, but only such as may be considered dangerous to life and limb. No definite standard is set; no hard and fast rule is enunciated. In doubtful cases, the responsibility is placed upon the employer himself who, if harm comes to the child, that child at the moment of injury exercising such reasonable care and prudence as his age and

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experience will permit, must feel himself able to satisfy a jury that such employment does not come within the inhibition of the statute.

"*Second.* Was there any evidence at all that the machine in question was dangerous? And, *third*, granting, for the sake of argument, that there was evidence that the machine was dangerous, was not the overwhelming weight of the evidence to the contrary?"

We will consider these two questions together.

The fact that plaintiff lost a portion of his hand in the course of his employment, accidentally or otherwise, need not, we think, in this case be considered as bearing upon the character of that employment. A glance at the machine upon which plaintiff received his injury shows that it is operated by means of two sets of gears; and that both are unprotected. The statute (section 15, Act No. 285, Pub. Acts 1909) provides "*all gearing or belting shall be provided with proper safeguards.*" That the mechanism here considered comes within the definition of "gearing" cannot be doubted.

Here, then, is a positive duty imposed upon the master, a breach of which would render him liable if, by reason of such breach, injury resulted to a child exercising due care at the time of the accident. We do not overlook the recurrence of the word "gearing" in the latter part of the section, where the determination of necessity for protection is left to the judgment of the factory inspector. We do not think the use of the word here can be permitted to modify the effect of the express mandate contained in the earlier part of the section. If we are correct in so holding, it follows that the learned circuit judge, in submitting the whole question to the jury, took a position more favorable to defendant than it was entitled to demand. A careful review of the entire record convinces us that there is no reversible error.

The judgment is affirmed.

MOORE, C. J., and STEERE, STONE, and OSTRANDER, JJ., concurred.

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SHERWOOD *v.* DAVIS.

1. TRUSTS—VENDOR AND PURCHASER—RESULTING TRUSTS.
Under the provisions of 3 Comp. Laws, § 8835, abolishing resulting trusts where the title of real property is taken in the name of another than the person who furnished the consideration, no trust was created by the purchase of a farm with money of complainant, who caused the title to be conveyed to his daughter, intending that she should reconvey to him if he should so desire. 3 Comp. Laws, § 9509.

2. SAME—CONVEYANCES—EVIDENCE OF LOST WRITTEN INSTRUMENT.
In order to satisfy the provisions of section 9509, 3 Comp. Laws, a written instrument granting or vesting some estate in complainant must be produced or its loss accounted for and contents established by competent evidence.

3. SAME.
Evidence of general statements of a decedent that she had agreed to execute a conveyance at a later time, do not establish the execution and existence of such an instrument.

Appeal from Washtenaw; Kinne, J. Submitted November 15, 1911. (Docket No. 126.) Decided February 10, 1912.

Bill by George F. Sherwood against Fred L. Davis, administrator of the estate of Jennie L. Davis, deceased, and others, to set aside a certain deed of land and for further relief. From a decree dismissing the bill, complainant appeals. Affirmed.

Frank A. Stivers, for complainant.

Arthur Brown, for defendants.

BLAIR, J. Complainant, a resident of New Orleans, La., contemplating the purchase of a small tract of land in Ann Arbor, in this State, for the purpose of assisting his daughter, who was in straitened circumstances, and

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to provide a home for himself in his declining years, appointed his daughter, Jennie L. Davis, his agent to represent him in carrying out his purpose. All communications between complainant and his daughter were by letter.

June 19, 1909, complainant wrote:

"I appoint you my agent in all matters appertaining to it, and expect you to take charge of the property for me. About the rent you are to pay, we will let that matter rest until such time as we see what can be done with it. I will see that you have a cow and horse and other things necessary to run it, so far as I can, and want you to keep me informed as to taxes, insurance, etc. I won't listen to any one else having a word to say in the matter and leave everything in your hands as my agent for which I will pay accordingly for services rendered.

"I, of course, expect you to live on the place and take care of it, until such time as I shall want it myself, when other arrangements can be made with me, and me only. If anything happens to me the place belongs to you. Keep this letter until I ask for it. Make a draft on our company for $1,500 and we will meet it at once. In the meantime if anything should happen to you, and I am alive, it of course will be for me to decide."

On June 28, 1909, he wrote, among other things:

"Have everything made out in my name as you understand I would not have the right to give it to you by law, without a will and I am buying it for two reasons. One, I may want it later on when I get through work, and also for a place for you, so you won't be paying out rent. * * * I don't want any trouble with the rest of them, and I am simply getting the ready money I have on hand into something for the future. In any case you will be better off and not be bothered every month for rent.

"I believe it can be made to pay and furnish you a good healthy living and I may never want it, but if I do, we can make arrangements so as not to make any trouble."

July 7th he wrote:

"I think we have made a good bargain and I don't want you to think you are going to get rich on it, for I am looking at it in this light, it will make an independent place for you and if I want to live on it later on I can do so, and not be holding to any of them."

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In accordance with her father's instructions, Mrs. Davis employed Mr. Stivers, a member of the Ann Arbor bar, to perform the necessary legal services in examining the title and making the transfer. Mr. Stivers prepared a deed from the owners, conveying the land directly to complainant, which was deposited in a bank, to be delivered upon receipt of $1,500 in cash and a mortgage for $1,500, the balance of the purchase price. Mr. Stivers, having prepared the note and mortgage, forwarded them to complainant for execution and return July 3, 1909.

July 8, 1909, complainant wrote:

"The papers came this morning from Mr. Stivers, your attorney, and I placed them in the hands of my attorney, Mr. Buchmann. Now, Jennie, I have decided to have the property deeded to you, so you can sign the mortgage, and assume the whole business. It will be made out in your name. Of course, I will attend to sending you the payments as they come due, 1st of July and 1st of January, semi-yearly.

"Mr. Buchmann, my attorney, will write to Mr. Stivers so he will understand what to do. You of course and I expect Fred will have to sign the note and everything just as if you bought the property. If it is not necessary for Fred to sign it you need not have him do so. When everything is finished up I will get you to deed it back to me, and I expect you to agree to this. In this way I can control the property and keep it for you alone and not let any one bother you. A little later I will make a will and take good care that the others can't bother you. Don't let this letter lay around for anybody to read but yourself. I'm sure this is the best way and takes less time. I will see the bills paid, note and interest, etc., and send you money as I get to doing some business. You can get Mr. Stivers' bill when he gets through and send it to me. * * * I have enclosed your letters to Mr. Stivers and he will see that the business is carried out and recorded properly. Get everything straight and we can attend to the transfer back to me later on."

On the same day, complainant wrote to Mr. Stivers:

"I have decided to have the Grose property lately purchased by me deeded to my daughter, Mrs. Fred L. Davis

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of your city, and she is hereby authorized to do all the business attached to same.

"My attorney, Mr. Buchmann, of New Orleans, will write you full particulars at once.

"Please see that the transfer and everything is properly attended to, and when finished send your bill to me."

July 9th complainant's New Orleans attorney wrote to Mr. Stivers:

"Mr. George F. Sherwood, of this city, to whom you sent for signature the enclosed mortgage and note, requests that you have the documents changed so as to have the property conveyed to his daughter, Mrs. Jennie L. Sherwood, wife of Fred L. Davis, who resides in Ann Arbor, instead of to himself. She will also execute the mortgage and note forming part of the sale. Mr. Sherwood has written to Mrs. Davis today advising her of his wishes in the matter, and also instructed the Farmers' & Mechanics' Bank to pay over to Mr. and Mrs. Grose the $1,500 which it has to his credit, to them, upon their execution of deed to property to his daughter just as it would have done had the deed been made in his favor. * * * I would also request that you insert in mortgage, clause corresponding with note showing that purchaser has the privilege of paying multiples of $50 at any interest paying date."

July 14th complainant wrote

"Your letter of the 11th just came and in relation to my changing my mind, I did it at the advice of my attorney and I know he is right. The idea is that I won't have you bothered by any of them, and when I want it deeded back to me (if I ever do) I will let you know and even then it will not make the slightest difference to you. I will take care of the mortgage and payments as they come due, and you must keep me posted a little ahead. * * * I thought the trouble would be less to have it and everything else put in your name, of course I will protect that a little later on with a will, for even as it is with you in possession you have a fight on your hands. * * * See that everything is all right and send the lawyer's bill to me, you have nothing to worry about. * * * You can rest assured that I am not staying down here by choice, and when I leave I intend to get

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enough to be fairly comfortable, with what can be dug out of the farm. If you like it, when it is paid for we will add to it and be 'big Ingen farm.'"

July 25th he wrote, in part:

"You are all right, Jennie, and you understand that you have bought the farm, have the notes and everything in your name and I will give you the terms of payment soon enough and make you pay it, too, so don't worry about any gift enterprise. Don't worry and don't work yourself sick, and you will have the nicest, cleanest little farm in existence, and I'll help you make the Davis farm a model."

September 13, 1909, complainant wrote, in part:

"After a while I will consult my attorney or the one at Ann Arbor who attended to your work and arrange in some way by notes or will that will leave you safe to pay for the place, when I see fit to make the terms. As it is I doubt if I could buy it for you myself, and you understand that you are buying, in fact have bought it and I am simply your security."

In accordance with the changed plan, the $1,500 furnished by complainant was paid, the deed of the premises was made directly to Mrs. Davis, and she executed the note and mortgage to the bank; the vendor having received the money therefor from the bank. On the 25th of September, 1909, Jennie L. Davis died, leaving surviving her four infant children and her husband, Fred L. Davis, who was afterwards appointed administrator of her estate.

The bill of complaint prays:

"*First.* That said paper, purporting to be a deed, made the 14th day of July, A. D. 1909, and recorded in the office of the register of deeds in and for the county of Washtenaw, in Liber 175 of Deeds, at page 308, from Lorenzo D. Grose and wife to Jennie L. Davis, a copy of which is hereunto attached, marked 'Exhibit A,' as aforesaid, be declared null and void and inoperative for the conveyance of any of the real estate and property therein mentioned; that your orator be subrogated to the rights which the grantors in said deed, the said Lorenzo D.

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Grose and wife, formerly had in the said premises; and that your orator be declared to be the legal owner in fee of said land and premises, subject only to the mortgage in favor of said Farmers' & Mechanics' Bank of Chelsea, Mich.

"*Second.* That if the relief prayed for in the foregoing paragraph be not granted by the honorable court, that your orator may be subrogated to the former rights of said Lorenzo D. Grose, so far as relates to that part of the consideration advanced by your orator towards the purchase of said premises, to wit, the sum of fifteen hundred dollars ($1,500), with interest thereon at the legal rate from the 14th day of July, A. D. 1909, and that your orator be declared to have a lien upon the said premises for the said amount and interest thereon, subject only to the prior incumbrance in favor of the said Farmers' & Mechanics' Bank of Chelsea, Mich.

"*Third.* That a receiver be appointed by the order of this honorable court to have charge of the said land and premises, and to collect the rent and income therefrom, pending the termination of this suit."

A decree was entered dismissing the bill; the circuit judge saying in his opinion:

"There is no real controversy as to the facts in this case. This transaction was intended for the benefit of both the daughter and the father; the daughter to enjoy it always, and the father to have it as his home, when he desired to retire from business. If the daughter had lived, there probably would have been no misunderstanding about their respective rights and interests in this property. The evidence abundantly proves the fidelity of the daughter to the trust reposed in her by her father, even to the last act in her life. She undoubtedly understood that it was her duty, and she stood ready at all times, to redeed this property to her father upon his request. Hence it must follow that all the equities of this case are with the complainant, and he is entitled to the relief sought, unless his rights and remedies are barred by the statutes of this State. In my opinion, such is the case. The mere intention of the parties cannot prevail against the express enactments of the statute. I think that sections 8835 and 9509 are prohibitive against the bill of complaint in this case. It may be assumed that if the daughter had lived she would have carried out the wishes of her father; but

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he allowed this title to pass unconditionally to her, and with her death it passed, in my opinion, to her heirs, and he is without remedy."

Complainant has appealed to this court.

Counsel for complainant contends that the statutory requirement of a written agreement was fully complied with. In support of this contention, he cites declarations of Mrs. Davis to the effect that she had agreed to reconvey to her father, which agreement must necessarily have been in writing, arguing that secondary evidence is admissible to prove the agreement evidenced by lost letters. Conceding that the declarations of Mrs. Davis establish the fact that she had agreed with her father to reconvey the land, and that such agreement must have been contained in a letter, is this sufficient to satisfy the statute? The deed was made with the full knowledge and consent, and by the express direction of, complainant, and the transaction was carried out by Mrs. Davis precisely as he wished her to carry it out. We are satisfied that complainant did not contemplate that his daughter should execute a formal paper, contemporaneous with the deed, or furnish Mr. Stivers with any information to enable him to protect complainant in that regard, since the letter of Mr. Buchmann, the contents of which he knew, contained no such instructions. The instructions, relative to getting everything straight, related to the conveyance of a perfect title. We are also satisfied that Mrs. Davis violated no trust or duty of any kind which she owed to complainant in taking the conveyance; and that the title vested in her, under the provisions of 3 Comp. Laws, § 8835, unaffected by the provisions of section 8837.

We are also satisfied that some kind of an arrangement existed as to a reconveyance of the land to complainant by Mrs. Davis, and that this arrangement was evidenced by the letters of the parties; but only one of the many letters of Mrs. Davis was produced, and that said nothing on the subject. Complainant testified that this was the only one of her letters which he could find, and no attempt

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was made to prove by secondary evidence the contents or substance of any of the other letters.

To satisfy the provisions of 3 Comp. Laws, § 9509, an instrument in writing must be produced, or its loss must be satisfactorily accounted for, and its contents established. General statements, such as those made by Mrs. Davis that she had agreed to reconvey the land when her father came to see her in the fall, are not sufficient. This is one of those unfortunate cases where the courts can furnish no relief. See *Wipfler* v. *Wipfler*, 153 Mich. 18 (116 N. W. 544, 16 L. R. A. [N. S.] 941). This arises largely, however, through the carelessness of the complainant in failing to observe the care which his daughter exercised in keeping important business letters.

The decree is affirmed.

MCALVAY, BROOKE, STONE, and OSTRANDER, JJ., concurred.

AMMER v. POSTAL.

1. MASTER AND SERVANT—NEGLIGENCE — DEFECTIVE ELEVATOR — INSPECTION—EVIDENCE.

In an action for personal injuries charged to have resulted from the fall of defendant's elevator that plaintiff claimed had previously given evidence of a defective and unsafe condition, the trial court erred in excluding answers to questions asked of plaintiff's expert witness, in support of the charge contained in his declaration as to defendant's failure to inspect the elevator, whether an inspection would have disclosed certain defects, how often the brakes and safety devices ought to be inspected, and how the inspection should be made.[1]

[1] Duty to employés as to inspection of elevator, see note in 21 L. R. A. (N. S.) 592.

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2. SAME.

Nor should the court have directed a verdict for defendant for the alleged reason that there was no sufficient evidence of any neglect, upon testimony having a tendency to show that the elevator had failed to stop some four weeks prior to the injury, that the safety catch had been jarred and was fastened back, that the elevator twice dropped during the week before the accident, and also a few hours previously.

3. SAME.

Plaintiff could not be required to show by direct testimony what was the specific defect that caused the improper working of the elevator.

Error to Wayne; Rohnert, J. Submitted November 21, 1911. (Docket No. 156.) Decided February 10, 1912

Case by Christian W. Ammer against Fred L. Postal and Austin E. Morey for personal injuries. A judgment for defendants on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Eugene L. Mistersky and *James A. Murtha* (*John H. Dohrman*, of counsel), for appellant.

Luman W. Goodenough, for appellees.

STEERE, J. This action is brought by plaintiff to recover damages for personal injuries sustained on July 16, 1905, while in the employ of defendants, engaged in running an electrical passenger elevator in the Griswold House in the city of Detroit, of which hotel defendants were proprietors.

Plaintiff's declaration is in proper legal form, with the usual allegations and averments in general terms, charging failure on the part of defendants to provide reasonably safe appliances with which to operate the elevator, failure to inspect and keep the same in repair, a generally unsafe and defective condition, and particularly that the brake and safety catch appliances of said elevator became out of repair, defective, and unsafe, of which fact defendants

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had due notice, by reason of which, while plaintiff was operating the elevator in a proper manner and with due care, it dropped a distance of five stories to the basement, inflicting on him serious and permanent injuries.

Defendants pleaded the general issue with the statute of limitations added, against objection, at the trial. The latter plea was not passed upon by the trial court, and is not properly presented by the record or briefs for consideration here.

The case was tried in the Wayne county circuit court before a jury. At the conclusion of plaintiff's testimony, the trial judge, of his own motion, directed a verdict for defendants on the ground that plaintiff had failed to produce sufficient evidence of defendants' negligence to justify submitting the same to a jury, stating that it would be absolute speculation and conjecture on their part as to what caused the accident. Plaintiff's assignment of error is the ruling of the court that the testimony was only speculative, followed by taking the case from the jury and directing a verdict in favor of defendants. It therefore becomes necessary to ascertain if there was any competent evidence produced by plaintiff of defendants' negligence in the particulars alleged in the declaration.

Plaintiff testified that he had worked on elevators off and on for 16 years, had operated electric elevators before, but was not a mechanic and did not understand their construction and machinery, except that he knew how to start and stop them, and cut off the electric current, and do other things proper for their operation. He first had trouble with this elevator four weeks before the accident, when he could not get down from the sixth floor without help from the engineer, having gone up against the beams, which jarred or sprung the safety catch. He told the manager and informed him that he did not know how to set the safety catch; reported it to the engineer, who looked after the elevator. The catch was tied back with a piece of rope and wire. He was shoved up against the beams four different times. About two weeks after the

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first trouble, he wanted to stop at the dining-room floor and could not, but slid to the basement at about full speed, breaking mirrors on each side of the car: on day of accident picked up a passenger on fifth floor, tried to stop at fourth, but brake did not act, worked controller to stop, and turned off the current without effect, and dropped five floors to the basement: on Saturday before accident had trouble with the car. It slid too much even without anybody in it but himself. After the accident, two cables were loose at the top of the car, hanging down, and later on the elevator man opened the controller box, and about two handfuls of copper dust fell out of the box.

A witness named James Luck testified that he worked at night on the Griswold House elevator in July, 1905; that it did not run the night following the accident to the plaintiff. It slid with him two or three days before the accident, slid from the second floor to the basement and went down with a bump. Reported this occurrence to the head clerk of the hotel.

A witness named Harry Byam was bell-boy at the hotel, and among other things it was his duty to run the elevator when it was necessary to relieve plaintiff. He operated it two or three times at intervals on the day of the accident, relieving the plaintiff for from five to fifteen minutes at a time. While coming down from the sixth floor with a passenger, he tried to stop at the dining-room floor, but the elevator would not stop and ran down to the basement, from which it had to be pushed up. Witness was in the car with plaintiff at the time of the accident, getting on at the fifth floor: noticed that the elevator was uncontrollable when the plaintiff tried to stop it at the fourth floor, throwing the lever back in position to stop the car, and then throwing it the other way and back up again, and then turning off the electricity, but the car went on down just the same as fast as it could go. After that the machinery was repaired. Witness saw them take part of the clutch on the pulley wheel apart, on top and underneath—the friction plate.

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Thomas West, an electrician, testified that he had been engaged in the business for 14 years; understood the construction of the Otis electric elevator; had been employed as electrician by the Public Lighting Commission and the Majestic Building. After qualifying as an expert witness, he was examined at length regarding the construction of electric elevators in general, and the one in which the accident occurred in particular; he having personally examined it. During his examination he demonstrated the construction and action of the brake and some other parts of the elevator on the blackboard before the jury. To a hypothetical question as to what condition would cause the car to drop, he said:

"If the friction plate is not properly adjusted to allow the springs to work so that it will pull it up against the pulley, the weight of the car will have a tendency to overcome the friction on the pulley, and the car would slide. That is caused by improper adjustment of the largest nuts or the wearing out of the leather on the inside of the clutch. * * * Also, if the brake or clutch spring refused to work, and the car got to a speed sufficient to throw the clutch in on the bottom of the car, that would stop it. If the clutch did not work, or the brake did not work, it would show a defective covering of the clutch; a defective covering, or a defect in the clutch itself, or both."

In the examination of this witness the court took an active part, asking numerous leading and sometimes argumentative questions, to which counsel at times objected. During the examination of the witness as to what conditions might cause the accident, the following occurred:

"*The Court* (continuing): Then either the car did not go fast enough to throw it out—just a moment—either the car did go fast enough to throw the governor out, or else there was no covering there, or it was out of repair?

"*A.* Yes, sir.

"*The Court:* One of those three conditions?

"*A.* Yes, sir.

"*The Court:* And you don't know which one?

"*A.* No, sir.

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"*The Court:* Now, you see that is what I am trying to illustrate; it is speculation. * * *

"*Juror:* Can I ask a question?

"*The Court:* Yes.

"*Juror:* Does the controlling lever ever get out of repair so that it don't shut the current off as they move it from one position to another?

"*A.* Yes, sir.

"*Juror:* What effect does that have upon the elevator, if the current was not shut off on the way down?

"*A.* Well, it would strike pretty hard; at the bottom it would stop itself automatically.

"*Juror:* What makes it stop there?

"*A.* There is an automatic trip.

"*Juror:* Suppose the controller did not shut off the current, would that still shut it off?

"*A.* Yes, sir.

"*By Mr. Goodenough:* Suppose the automatic were out of order too, what then?

"*A.* Well, then it is time they had them fixed, if they are both out of order.

"*The Court:* That is what I call a smart answer. You are too bright a man to give such an answer as that. The question is what would happen?

"*Mr. Goodenough:* What would be the effect if the automatic were out of order?

"*A.* The brake would set itself; you could not run the car with the automatic out of order.

"*Q.* If the automatic was out of order and the controller was out of order and did not shut the current off—

"*The Court:* There are two automatics—one is controlled from the car and the other is controlled by pulling a cable. * * *

"*The Court:* Mr. West, I want to ask you one question. The safety brake that stops the car, that is not a safety brake, but a regular brake and gears—that may not work because it may be out of order or not properly adjusted.

"*A.* Yes, if it is not properly adjusted, it is out of repair. * * *

"*The Court:* Suppose there is something wrong with the controller by which the motor could not stop, that would have a tendency to let it go down faster?

"*A.* There is a controller with safety device to overcome that.

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"*Q.* There might be something wrong with the controller by which the power would be put on, and you could not shut it off, and the car would continue to go down?

"*A.* Yes, sir.

"*Q.* So that might cause the car to go down?

"*A.* Yes, sir."

While the court was conducting a somewhat lengthy examination, the following occurred: Mr. Dohrman, objecting, said:

"I don't believe your honor understands this man.

"*The Court:* I understand him fully if I understand anything. In the first place, let me ask you a few questions. In the first place, witness, if the clutch is out of repair, it would not permit the clutch to grab and stop the elevator, would it, and it would slide down if the clutch—

"*A.* Do you mean the brake or the safety clutch?

"*The Court:* If it was not adjusted properly, it would tend to let it go down?

"*A.* Yes.

"*The Court:* So, also, if there was—there might have been something in the controller which was out of kilter and which would prevent the controller from controlling the descent of the car, or the current, and that might bring it down. Now, there are three conditions. * * *"

There are several pages of the record indicating that the court trespassed upon the province of counsel in the examination of this witness, and was obliged to make rulings upon his own questions, manifestly finding it difficult to be impartial in that particular.

One of the allegations of negligence in plaintiff's declaration is failure to make proper inspection. To sustain that allegation, the following questions were asked of the witness West, and objections thereto sustained:

"*Q.* I ask you with reference to an inspection, the causes which you have mentioned—and mentioned by the court—could they be discovered upon inspection?

"*Q.* What is your experience as to inspection of braking devices and safety devices on Otis elevators?

"*Q.* How often do you inspect brakes and safety devices on elevators?

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"*Q.* How often in your opinion should brakes and safety devices on elevators be inspected to render them safe and reliable?

"*Q.* Do you know, Mr. West, the manner and method of the inspection of elevators?

"*Q.* Do you know how often such devices should be inspected?

"*Q.* Would an inspection have disclosed the defects which you have mentioned in your answers?

"*The Court:* They would if they had been there at the time of the inspection; I will answer that for you. If they were not there at the time of the inspection, it would not have disclosed it. They would if they were there at the time of the inspection. If they were not there, they would not be disclosed. I will answer for you."

To these rulings of the court exception was duly taken. We think the proposed testimony should have been allowed, and its exclusion was error.

We think there was testimony to go to the jury under the claim of plaintiff that the cause of the accident was a defective condition of the friction brake and safety clutch —one or both. The record contains testimony that four weeks before the accident complained of plaintiff was "shoved up above the limits" and against the beams so that he could not get down without the aid of the engineer; that this jarred the safety catch; that this was reported to the manager and engineer whose duty it was to look after the elevator; that at that time the safety catch was tied back with a rope and a loop of wire; that later the elevator slid from the dining-room floor to the basement, breaking mirrors on each side of the car; that the Saturday before the accident it slid again, and again some few hours before the accident, while Byam was operating it, it slid three floors to the basement, where it stuck so that he had to be pushed up. Luck testifies that two or three days before July 16th it slid from the second floor to the basement while he was operating it, which occurrence he reported to the head clerk. This is not a case in which the machinery worked well before and after an accident which was unexpected and unexplained. There

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is some evidence in the present case tending to show that the elevator had been out of order, that its working was spasmodic and unreliable, and that defendants had notice of it; even though it may be slight, it was sufficient to carry the case to the jury, whose province it is to determine, under proper instruction, what reasonable inferences, if any, it affords as to defendants' negligence in not inspecting and keeping the same in repair. *Redmond* v. *Lumber Co.*, 96 Mich. 545 (55 N. W. 1004).

While negligence cannot be inferred from the bare accident, or guilt found upon mere speculation and conjecture, without facts from which reasonable and logical inferences can be drawn, recovery is not limited to those cases where plaintiff can produce direct testimony of the specific defect in a certain part of the mechanism, or "diagnose the particular cause of inefficiency and prescribe the remedy." *Casterton* v. *Blower Co.*, 142 Mich. 407 (106 N. W. 61); *Wilson* v. *Woodenware Co.*, 152 Mich. 540–546 (116 N. W. 198).

The judgment is reversed, and a new trial ordered.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

GEEL v. GOULDEN.

1. VENDOR AND PURCHASER—NOTICE—CONTRACTS.

Knowledge of the fact that a land contract was never signed by the vendee will be imputed to the vendors of land who held in their possession one of the original written instruments that were prepared in duplicate, for a period of several years, accepting numerous payments on the instrument.

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2. SAME—PRINCIPAL AND AGENT—IMPUTED KNOWLEDGE.
And when a real estate broker, acting for the vendors, knew that the instrument was drafted with the name of an officer as grantee of the defendant, a partnership association, and that the officer had no personal interest in the deal, and that he assigned the contract to the association immediately thereafter; the broker being an agent of complainants, they were chargeable with the knowledge that he had.

3. SAME—ESTOPPEL.
As to such defendant assignor, complainants' bill to foreclose the land contract was properly dismissed.

4. PARTNERSHIP ASSOCIATIONS—LIMITED LIABILITY—STATUTES—DEBTOR AND CREDITOR—OFFICERS AND AGENTS.
A single manager or agent of a limited partnership association cannot by a contract in its name render the association liable in an amount exceeding $500. 2 Comp. Laws, § 6083.

5. SAME—LAND CONTRACT—MUTUALITY.
Under a land contract, conveying to an officer of a partnership association real property that thereafter he assigned to the association, which surveyed and platted it, paying taxes on the premises and installments on the contract, the partnership was not bound unless the contract was signed and executed by two managers as required by statute.

6. SAME—ESTOPPEL.
In the light of the express prohibition of the statute, the association was not bound by estoppel to pay the contract debt, and could, at any time, invoke the aid of the statute to avoid liability.

7. SAME—AFFIRMATIVE RELIEF.
But the partnership association is estopped in equity from attempting to recover back any of the consideration paid voluntarily to the vendor, and its cross-bill is dismissed.

Appeal from St. Clair; Tappan, J. Submitted November 22, 1911. (Docket No. 170.) Decided February 10, 1912.

Bill by Amanda J. Geel and others against Theophilus A. Goulden, the Factory Land Company, Limited, and Charles Wellman, trustee, to foreclose a land contract. The Factory Land Company, Limited, by cross-bill, prayed for affirmative relief. From a decree for com-

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plainants against defendant the Factory Land Company, and for the other defendants dismissing the complainants' bill, defendant the Factory Land Company appeals. Reversed and bill and cross-bill dismissed.

Thomas Wellman, for complainants.

W. L. Jenks, for defendants.

STEERE, J. The bill of complaint was filed in this suit by complainants for the purpose of foreclosing a certain land contract, dated October 22, 1902, for the sale of a tract of land, described by metes and bounds, located in the southern portion of the city of Port Huron, St. Clair county, Mich.

The contract purports to sell the land to T. A. Goulden, and is signed by the vendors only, who are the complainants herein. The consideration stated is $5,000, to be paid as follows:

"$1,000 down on the signing of this contract, and the balance on or before five years, with the privilege of paying $1,000 or more, at any time, on the principal of this contract, interest to cease on amount so paid at time of payment, with interest on all sums at any time unpaid hereon, at the rate of six per cent. per annum payable annually."

The purchaser is required to pay all taxes, ordinary and extraordinary, assessed against the land, and is to have immediate possession. The contract also contains the usual covenant to deed and forfeiture clauses. It was made in duplicate. On the original retained by complainants is the following indorsement:

"For value received I hereby assign the within contract to the Factory Land Company, Ltd.

"T. A. GOULDEN.

"Port Huron, Oct. 31, 1902."

In complainants' prayer for relief, they ask for an accounting, make tender of deed upon payment of amount adjudicated, and in default thereof ask for decree of fore-

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closure and sale in the usual manner; and, further, that, in case of sale, should said land fail to produce a sufficient sum to pay the amount found due, said defendants shall be adjudged personally liable for the deficiency, and complainants have execution therefor.

The Factory Land Company, answering, alleges that, although its secretary caused the assignment of October 31, 1902, to be prepared, and requested defendant Goulden to sign the same, no consideration was paid him therefor, and no legal obligation was incurred thereby. It further alleges that the money paid to complainants on the alleged land contract was paid by the secretary, without consideration, and in violation of law, and prays that its answer be considered in the nature of a cross-bill, under which it seeks to recover the amount of money thus unlawfully paid complainants, asking a decree in its favor for the same.

Defendant Goulden, answering separately, denies that he was a party to the contract in question; denies that he ever entered into occupation or possession of the land mentioned therein; alleges that he has no interest whatever in said land, or in the contract therefor, and avers that no consideration ever passed from him to complainants, or to him from the land company for his assginment; denies that the other defendants can have any right or interest in the land through or under him; alleges that he executed the assignment indorsed upon the contract at the request of the Factory Land Company, with no other or further interest in the transaction.

Defendant Wellman, trustee of the land company, denies any interest of any kind in the premises described, and prays that the bill be dismissed as to him.

The testimony discloses that E. F. Percival, a real estate agent of Port Huron, was authorized by complainants to act as their agent in dealing with the purchaser for this property, and so acted as their agent and representative. He negotiated the deal with E. L. Moak, who was secretary and one of the executive officers of the de-

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fendant Factory Land Company, a partnership association, limited, organized under chapter 160, 2 Comp. Laws, "for the purpose of purchasing, improving and selling of land, encouraging manufacturing, building and renting houses, warehouses, docks, factories and stationary ship machinery."

Moak, as secretary, had active management of the company's affairs, making purchases, sales, and collections for it. He bought a great deal of property for the company, under contract, having in fact, as he states, charge of practically all the work and making of contracts with different individuals. He testifies:

"I have authority sufficient to appropriate the money of the company to purchase land, and have general authority in that direction."

Several members of the land company, including Moak, became interested in, and desirous of, purchasing the property in question for the company, and decided to do so. Satisfactory terms having been reached by Percival and Moak, each representing his respective principal, the contract under consideration was prepared. At the instance of Moak, and because, as he testifies, it was thought advantageous to the plans of the company, T. A. Goulden, treasurer and one of the executive officers of the company, was named as vendee. He was not a party to any of the negotiations, and first learned of the transaction, and use of his name in that connection, just before the papers were drawn up, at which time it was brought to his attention by Moak and Percival, who informed him that the land was being bought for the company, and it was deemed advisable to take the title in his name.

On the day the contract was executed by complainants, Goulden, at the request of Moak, executed the assignment indorsed on the original contract, which was delivered to complainants, and subsequently he made a similar indorsement on the original copy retained by the company, for the purpose of completing its record of the transaction.

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His indorsement was without consideration, and simply made at the suggestion and request of Moak.

On October 31, 1902, Percival receipted to the land company, in behalf of complainants, for $500. Indorsements on the contract show the payment, on December 12, 1902, of $500 more, making the $1,000 to be paid down on the execution of the contract. Further indorsements show the annual payment of interest, amounting to $240 each year, up to and including November 4, 1907, making a total of $2,201 paid complainants. Moak testifies that he made these payments out of the funds of the company, and also, from the same source, paid $758.37 in taxes; that he drew the money for the purchase of the property from the funds of the Factory Land Company, drawing checks on the treasurer, who was Mr. Goulden; the checks being drawn so that they could be cashed at the bank.

The duplicate contract prepared for the vendee was taken by Moak and kept among other papers of the company in its office. Entries of the payments to complainants were made in the books of the company, which were open to the inspection of the directors and stockholders. Moak presented and filed, at the annual meeting of the company of that year, a statement, showing the payment of this $1,000 on the contract. The annual meeting was held in August, 1903, so that the directors had opportunity to know how much money was invested in the property at that time. The property was carried upon the books of the company, and known as the Geel property. The company had possession of the property, from the time of its purchase, to the extent that it controlled and exercised the same dominion over it ordinarily exercised by owners over land in like condition; it being vacant and unfenced. It was surveyed by the company, though no stakes were driven; a plat was made of the lands of the company in that locality, known as the Buena Vista plat, including this property with contiguous land purchased from other sources.

Neither duplicate of the prepared contract was signed by any one as purchaser or vendee. Complainants, dur-

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ing all the intervening years, were in possession of one of the originals, and cannot plead ignorance of this palpable imperfection. Knowledge of the legal rights and responsibilities of both parties, under such conditions, is imputed to them.

It is claimed in their behalf that the doctrines of part performance and estoppel relieve this contract from the statute of frauds, and preclude defendants from denying its validity.

It is charged that defendant Wellman, as a trustee of the land company, claims some right or interest in the premises. This is denied by him, and there is no evidence of any kind tending to show that he ever made such claim, or in any manner became personally a party to, or participated in, the transaction.

Defendant Goulden's name appears on each of the duplicates, under an indorsement assigning the same to the land company. It is claimed that this, in legal effect, is equivalent to signing and accepting the contract, and makes him personally liable according to its terms. So far as these indorsements speak for themselves, they indicate a transaction between him and the land company, not between him and complainants. Percival, who was complainants' agent, participated in and had full knowledge of all the facts and circumstances attending this assignment. He knew Goulden took no part in the negotiations, was not personally interested in them, was not the purchaser, and knew nothing of the matter, until the terms had been agreed upon between Percival and Moak for the sale of the premises by complainants to the land company. He knew Goulden paid nothing for the contract, and received nothing in payment for his assignment, only signing the same as an accommodation, at the request of Moak, with the approval of Percival, for some purpose Moak considered in the interest of the company, which was known to be the actual purchaser.

No question of undisclosed principal is involved. Percival's knowledge was complainants' knowledge. They

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cannot claim to have been deceived or misled by things done with his knowledge and consent.

Between complainants and defendants Goulden and Wellman, the testimony discloses no facts at the time of the negotiations, and no subsequent conduct, under which the elements of mutuality essential to a contract are discernible, or under which the doctrine of estoppel can be invoked. As to those two defendants, the bill of complaint was properly dismissed.

Between complainants and the defendant land company, an entirely different situation presents itself. It is urged with much reason that the land company, by reason of having, through its agent, negotiated to purchase the property, accepted and retained a contract, signed by the vendors, made payments on said contract, surveyed, platted, and paid taxes on the premises, has established the elements of mutuality which make the agreement valid and binding on both parties, and is estopped from denial, under the ruling in *Mull* v. *Smith*, 132 Mich. 618 (94 N. W. 183). Were the defendant company a natural person, with unlimited power to contract, we think the authority cited would be controlling. The Factory Land Company is an artificial person, with its powers and duties limited and prescribed by statute. In its behalf, the contention is made that part performance and estoppel cannot be invoked against it in the face of a positive statutory prohibition.

The statute relied on, and under which the company is organized, provides, in part, as follows:

"No debt shall be contracted nor liability incurred for said association except by one or more of said managers, and no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association unless reduced to writing and signed by at least two managers, except in case of associations for the purpose of buying and selling merchandise," one manager may be authorized to make contracts and sign notes for the same. [§ 6083, 2 Comp. Laws.]

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It is well settled by previous decisions of this court that a single agent or manager of a partnership association, limited, organized under said statute, cannot, by a contract in its name, make it liable in an amount exceeding $500; and that the statute may be interposed as a defense in any suit brought to enforce such contract. *Citizens' Sav. Bank* v. *Vaughan*, 115 Mich. 156 (73 N. W. 801); *Rhoades* v. *Pure Food Co.*, 149 Mich. 235 (112 N. W. 940); *Hoyt* v. *Grape Juice Co.*, 158 Mich. 619 (123 N. W. 529); *Beach* v. *Publishing Co.*, 163 Mich. 226 (128 N. W. 177); *Armstrong* v. *Stearns*, 156 Mich. 597 (121 N. W. 312).

In *Citizens' Sav. Bank* v. *Vaughan*, *supra*, indorsements of the association on notes of over $500 each, apparently made in the usual course of business by one of its officers, were involved. It was said:

"Undoubtedly both parties acted in ignorance of this statute; but the statute must control. * * * We think the statute contemplates that the invalidity should attach to every contract in its entirety, where the amount exceeds $500."

In *Rhoades* v. *Pure Food Co.*, *supra*, in a suit for services rendered under a contract for hiring at an annual salary of $2,000 per year, it was held plaintiff could not recover, because the contract was not signed by at least two managers of the defendant.

Hoyt v. *Grape Juice Co.*, *supra*, was a suit to recover under a contract of employment for over $500, signed by only one manager of the defendant. It was said:

"This contract was a nullity in its entirety, and it was no more binding upon the plaintiff than the defendant, upon the familiar principle that there was a want of mutuality * * * This defendant was in a situation to raise this question in its own defense at any time."

In *Beach* v. *Publishing Co.*, *supra*, the defendant being engaged in general publishing, book selling, and office supplies, it was held that:

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"Power conferred upon the general manager by the association to make contracts involving more than $500 must be limited to *merchandise contracts*. The contract in the case before us is one of hiring, and must be declared void under the statute."

In *Armstrong* v. *Stearns*, *supra*, it was held that under the exception in the statute, not only notes given for merchandise in excess of $500, but also notes given as accommodation paper, were valid obligations in the hands of bona fide holders against a partnership association, limited, whose business was buying and selling merchandise.

The case of *Howard* v. *Land Co.*, 167 Mich. 251 (131 N. W. 113), is cited by complainants in support of the contention that, in a proper case, such a contract will be sustained, though not executed as the statute requires. In that case the principles of previous cases are recognized and applied. Though the name of but one manager of the company appeared on the contract, it was held to be, in legal effect, signed by two or more, and the requirements of the statute complied with; the records of the company showing that at a meeting, duly held, all the managers and directors of the company, by proper resolution, voted to make the purchase and close the contract. It was the action of the board, preserved in the records of the company, which legalized the contract, not part performance.

We think, in the light of previous decisions applied to the practically undisputed facts in this case, the defendant land company could invoke the statute at any time as a defense against proceedings to enforce further liability and further performance.

By its cross-bill, the Factory Land Company seeks to recover the money paid on the purchase price and for taxes on the land, with interest, on the ground that the contract was void and the payments without consideration. While the doctrines of part performance and estoppel *in pais* will not render valid and aid complainants in enforc-

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ing an executory contract made in direct violation of a prohibitory statute, a different question is presented when a defendant asks a court of equity to undo that already done, and compel return of money voluntarily paid. It is to be borne in mind that this contract was not *ultra vires*. It was not fundamentally void of necessity, because outside the object for which the company was created. The company was organized to deal in real estate. It was within its power to accept and ratify this tentative contract of its agent and, at any time before complainants served notice to the contrary, make it valid by executing it according to the statute. It did not see fit to do so; but, quieting these complainants by these payments, from time to time, it kept control of the property, holding this unilateral contract as a symbol of ownership, in effect an option, awaiting the advent of fortuitous circumstances, if they came, and in position to throw up the project, if it proved unprofitable. The contract not being *ultra vires*, no question of public policy is involved, and we think the equitable doctrine of estoppel *in pais* can well be applied to such a state of facts.

Complainants' bill and defendants' cross-bill will be dismissed, without costs to either party.

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

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FLYNN *v.* BACHNER.

LANDLORD AND TENANT—LEASE—TERM—WAIVER.

Where the lessor of a building consented during the first part of the term to the tenants' subletting a portion of the premises in pursuance of a condition requiring his consent contained in the lease, which was for three years with the privilege of two more years at the lessee's option, the permit as to subleasing extended over the entire term of five years, upon the tenants' exercising their privilege.[1]

Error to Wayne; Rohnert, J. Submitted November 24, 1911. (Docket No. 179.) Decided February 10, 1912.

Summary proceedings by William H. Flynn against Nathaniel E. Bachner and another for the possession of leased premises. From a judgment for defendants, complainant appealed to the circuit court which affirmed the order of the commissioner. Complainant brings error. Affirmed.

May & Dingeman, for appellant.

Charles F. Welsh, for appellees.

BLAIR, J. Plaintiff is the owner of a four-story brick building located at 112 Farmer street, Detroit. The lower portion of the building is devoted to stores, one of which was on the 14th day of October, 1907, let to defendants under terms contained in a written lease. The portions of the lease pertinent to this inquiry are as follows:

"Portion leased: The first floor and rear of the basement as partitioned * * * for the term of three years from and after the first day of November, 1907, with the privilege of two years more at the expiration of said first

[1] Enforcement of landlord's consent to sublet or assignment of lease, see note in 25 L. R. A. (N. S.) 1173.

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three years, making, if said privilege of two years more is exercised, a total of five years, on the terms and conditions hereinafter mentioned, to be occupied for a glove store. * * *

"Monthly payments: And the said parties of the second part do hereby hire the said premises for the term of three years as above mentioned, and do covenant and promise to pay to the said party of the first part, his representatives and assigns, for rent of said premises the sum of one hundred and twenty-five dollars per month always in advance for said term of three years, and at the rate of one hundred and fifty dollars per month always in advance for the said term of two years, if the same is taken. Said parties of the second part further covenant that they will not assign nor transfer this lease, but can sublet if the business is satisfactory to the party of the first part."

The other usual covenants of a printed lease were contained in this instrument. After defendants had entered into possession of the premises, they sublet a portion of them to one Darr, in which to manufacture and sell ladies' belts. Plaintiff, claiming a violation of the covenants with reference to subletting and the use to which the premises were to be put, instituted summary proceedings to obtain possession of the premises, and obtained a judgment for restitution, which judgment was appealed from by defendants to the circuit court. The said appeal came on to be heard on October 17, 1910, at which trial the lessor claimed that the leased premises were being used by a sublessee, contrary to the terms of the lease. The lessees contended that plaintiff had verbally consented that the sublessee might use part of the leased premises. The issues as then framed were submitted to the jury under the charge of the court, and a verdict rendered in favor of the defendants. The defendants on the 4th day of October, 1910, served upon plaintiff, Flynn, a notice of their intention to avail themselves of the provision in the lease entitling them to an additional two-year term. Defendants continued to sublet a portion of the premises to Darr for the purpose of manufacturing and selling belts. Plaintiff then, on the 15th day of November, 1910, gave

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defendants written notice of a claimed forfeiture of the terms of the lease, and again instituted summary proceedings for possession of the premises. The matter came on for hearing December 6, 1910, at which time the defendants interposed, and the commissioner sustained, the plea of *res adjudicata*, which had been so interposed by defendants and therefore dismissed the proceedings. Plaintiff again appealed to the circuit court, where said matter, by consent of counsel, was brought on for hearing before Hon. Morse Rohnert, circuit judge, without a jury, on the 11th day of January, 1911, at which time said circuit judge made an oral finding in favor of defendants. A formal judgment was subsequently entered thereon by George P. Codd, circuit judge, successor to Morse Rohnert, deceased.

Plaintiff contends that the provision for an additional two years constituted an agreement to renew the lease if the lessee desired to have it renewed, and not an agreement to extend the term of the lease at the option of lessee. Defendants contend that the agreement amounts to a present demise for the term of five years at the option of defendants. If the defendants' contention is correct, it necessarily follows that the plaintiff's consent to the subleasing covered the term of five years. The circuit judge so held and sustained the plea of *res adjudicata*. In this conclusion we concur. *Delashman* v. *Berry*, 20 Mich. 292 (4 Am. Rep. 392), and cases cited by Justice OSTRANDER in *Stendor* v. *Kerreos*, 156 Mich. 507 (121 N. W. 258); *Kramer* v. *Cook*, 7 Gray (Mass.), 550; *Kimball* v. *Cross*, 136 Mass. 300; *Stone* v. *Stamping Co.*, 155 Mass. 267 (29 N. E. 623); *De Friest* v. *Bradley*, 192 Mass. 346 (78 N. E. 467).

The judgment is affirmed.

MOORE, C. J., and STEERE, MCALVAY, and BROOKE, JJ., concurred.

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POWELL v. PIERCE.

1. PROCESS—FORECLOSURE OF MORTGAGES—SERVICE BY PUBLICATION—AFFIDAVIT—JURISDICTION.
   In a suit to foreclose a mortgage on realty, an affidavit for an order of substituted service conferred jurisdiction where it averred that affiant was the solicitor for complainant, a non-resident, and was informed by his client and believed that the defendants resided in Chicago, Illinois. 1 Comp. Laws, § 485.

2. EQUITY — PRACTICE — CONFIRMATION OF SALE — ENROLLMENT—FORECLOSURE OF MORTGAGES—LACHES.
   Where a decree of foreclosure was rendered in 1891, the premises sold and the sale reported by the circuit court commissioner in 1892, the court, upon the petition of complainant's heir at law, had authority to confirm the report, after complainant's death, by a conditional order in 1910 and to enroll the decree.

3. SAME—PRACTICE—NUNC PRO TUNC ORDER.
   The court had power under 1 Comp. Laws, § 557, to enroll the decree *nunc pro tunc*.

4. EJECTMENT—DEFENSES.
   In ejectment, plaintiff must recover on the strength of his own title, not on the weakness of defendant's.

5. SAME—TAXATION.
   Defendant in ejectment who purchased his title of a tax purchaser by warranty deed had no right of entry upon the lands until a sufficient notice was served.[1] 1 Comp. Laws, § 3961.

6. SAME—IMPROVEMENTS—TAXATION.
   Being without color of title, he may not recover for alleged improvements under the provisions of section 3927, 1 Comp. Laws; being a trespasser his rights are not affected by section 10995, 3 Comp. Laws, authorizing compensation for improvements in ejectment, to the extent that they have increased the value of the land.[2]

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[1] Right of holder of tax deed to take possession, see note in 28 L. R. A. (N S.) 398.

[2] Right of one holding under invalid tax deed to be reimbursed for improvements, see note in 34 L R. A. (N S.) 549.

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7. SAME.

Plaintiff could not recover possession of unoccupied and uncultivated land in ejectment without tendering to the register of deeds the amount of taxes for which the property was twice sold to the State.

8. SAME—SAVING QUESTIONS FOR REVIEW.

By an assignment of error that the court erred in holding that plaintiff was the owner of the premises, entitled to possession thereof, the point was properly raised on error, though the correct reason was not presented to the trial court.

Error to Muskegon; Sessions, J. Submitted December 13, 1911. (Docket No. 128.) Decided February 10, 1912.

Ejectment by George H. Powell against Minnie Singer Pierce. Judgment for plaintiff: defendant was awarded the value of certain improvements made upon the premises, and remitted part of the verdict. Both parties appeal. Reversed.

Cross, Vanderwerp, Foote & Ross, for plaintiff and appellant.

Charles E. Ward, for defendant and appellant.

OSTRANDER, J. It is conceded that plaintiff has the original or government title to the land if certain foreclosure proceedings, to be later referred to, were regular. The land was sold for the taxes levied thereon in the years 1896, 1897, 1898, 1899, and was held as State tax lands. Defendant's asserted title is based upon certain tax deeds given by the auditor general to one Wheeler and upon a warranty deed from Wheeler. The tax deeds are dated, respectively, October 2, 1902, and August 22, 1903. In December, 1902, the tax title holder attempted, but ineffectually, to give the statutory notice to the owner or owners of the land. With the plea of the general issue the defendant filed a claim for compensation for improvements made upon the land, describing them, and assert-

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ing that she and the person through whom she claimed the title had peaceably occupied the land for six years before the suit was begun, under color of title and in good faith. In the trial court, judgment passed for plaintiff, as to the title, and for defendant for the value of the improvements. Upon a motion for a new trial, it was granted unless defendant remit one-half the amount of the damages fixed by the verdict. Defendant elected to remit. Both parties have assigned errors. The practice pursued by defendant in this behalf is not discussed in the briefs; indeed, does not appear in the printed record beyond the fact that errors are assigned.

1. **As to the Mortgage Foreclosure.** The mortgage was given in 1886. Forty acres are involved in this suit, being a portion of 320 acres described in the mortgage. In 1891, pursuant to the prayer of a bill in equity, filed by one William H. Powell, who charged that he was assignee of the mortgagee, a decree of foreclosure and sale was entered. In January, 1892, the circuit court commissioner made his deed of the premises to said Powell and filed a report of sale. Mr. Powell died intestate August 1, 1896. Plaintiff is his son and only heir at law. Personal service of subpœna was not obtained in the foreclosure proceeding, and defendants were brought in by publication. The affidavit of the nonresidence of defendants was made by one of the solicitors for complainant, who stated therein that his information, which he believed to be true, was derived from his client, the complainant. In brief, the affidavit stated that complainant lived in Chicago, Ill., and had told affiant that he knew the defendants and that they resided in Chicago. There was no appearance of defendants. The objection which is made is that the affidavit presented no evidence—was not proof—of the fact of nonresidence of defendants, and the order for appearance and the subsequent proceedings were wholly invalid. The governing statute is 1 Comp. Laws, § 485. Counsel have reviewed the decisions of this and of other courts touching the subject. We content ourselves

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with saying that the affidavit was some proof of the fact necessary to be established, and the court was therefore not without jurisdiction to make the order. *Pettiford* v. *Zoellner*, 45 Mich. 358 (8 N. W. 57); *Colton* v. *Rupert*, 60 Mich. 318 (27 N. W. 520).

It does not appear that an order confirming the report of sale was entered, or that the decree was enrolled, until 1910, when upon the petitions of the plaintiff, and upon *ex parte* hearings, an order was directed to be entered *nunc pro tunc*, enrolling the decree. An order *nisi* confirming the said report of sale was also entered. In entering the order *nisi* the names of the original solicitors for complainant were signed thereto; the firm having been long before dissolved.

It is said by defendant that the previous death of the complainant in the foreclosure suit, the lapse of time, and the death of one of the original solicitors, are facts which forbade the granting of the orders. We need not upon this point indulge in extended argument or review the numerous decisions to which we are referred. Conceding, for the purposes of argument, that confirmation of the sale was a necessary prerequisite to the vesting of the title in the purchaser at the sale, we perceive no reason for saying that the order *nisi* which was entered is not effectual. It was an order to which, originally, the complainant in foreclosure was entitled as of course. Mere lapse of time—no other reason being asserted—ought not to deprive the complainant, and those claiming under him, of a record fair upon its face.

And as to the order for enrolling the decree *nunc pro tunc*, the authority to grant it is undoubted. 1 Comp. Laws, § 557. See *Newton* v. *Newton*, 166 Mich. 421 (132 N. W. 91).

It must be borne in mind that defendant is not concerned in the matter beyond this: that in ejectment plaintiff must recover upon the strength of his own title—must show title. The defendant has, or has not, a good title and right to possession under tax deeds which, if valid,

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cut off entirely the title asserted by the plaintiff. We hold, affirming the court below, that plaintiff's decedent acquired title to the land through the foreclosure proceeding.

2. Defendant's Title. As has been stated, defendant has a warranty deed from one who held title by two deeds issued to him by the auditor general; the land being then held by the State as State tax land. The validity of these deeds is not questioned. This court has repeatedly held that the effect of regular sales of land to the State for delinquent taxes vests title in the State after the time to redeem from the tax sales has expired. But upon the sale of its title by the State the purchaser takes the title of the State upon a condition, and, until the condition is performed, has no right of entry. On the contrary, the tax title purchaser is forbidden by the statute to make an entry before performance of the condition and the lapse of six months. 1 Comp. Laws, § 3961.

Meantime he has not even a colorable right of entry, and, if he enters and makes improvements, may not, upon being dispossessed, recover the value thereof under the provisions of 1 Comp. Laws, § 3927. *Corrigan* v. *Hinkley*, 125 Mich. 125 (83 N. W. 1020). See, also, *Griffin* v. *Kennedy*, 148 Mich. 583 (112 N. W. 756); *White* v. *Dunsmore*, 167 Mich. 542 (133 N. W. 523).

It is provided in 3 Comp. Laws, § 10995, that whenever, in an action of ejectment, the plaintiff shall recover, the defendant shall be allowed compensation for improvements on the premises, made by him or by the person under whom he claims, to the extent that such improvements shall increase the present value of the premises, when the defendant, or the person through whom he claims title, has been in actual, peaceable occupation of the premises recovered for six years before the action was begun, and, also, when the premises shall have been so occupied for a less time than six years under a color of title and in good faith. Defendant's grantor entered upon the land in May, 1903. He conveyed it to defendant in April, 1906. This

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suit was begun in May, 1910. It is the contention of defendant that, although her grantor had no right to possess the land—was a trespasser thereon—she, because holding by a warranty deed, had color of title within the meaning of this statute and may recover for the improvements, or some of the improvements, made upon the land. Something is claimed, too, in this behalf, for the fact that her grantor undertook to give the statute notice, but failed to give a proper notice. Much has been, and much may be, said about the duty of landowners to pay taxes and to discover, within a reasonable time, whether the land is in the possession of a trespasser or of one having some apparent right to occupy it, and reasons may be found for asserting that the landowner ought not to profit by his own default and laches.

In ejectment proceedings, strict legal rights are involved. The legislature has defined the relative rights of owners of land and of those who purchase them as State tax lands in a law intended primarily to secure contributions by property owners to the public revenues. Courts must accept plain legislative definitions of rights and enforce the law as they find it. In respect to the point under discussion, the legislative purpose is not doubtful. The tax title holder is forbidden to make an entry upon the land described in his deed until he has given a certain notice and has thereafter waited a certain time. All persons dealing with him are bound to know this limitation of his rights. To hold that his grantee may enter without reference to the imposed condition is in effect to nullify the statute. To ground legal rights opposed to the terms of the statute upon ineffectual attempts to obey the statute is to introduce confusion and to make legal titles uncertain. We are of opinion that the defendant was unlawfully in possession of the land and had not a colorable right to possession. In so deciding we do not mean to determine whether the statute invoked (3 Comp. Laws, § 10995) has application in any case arising between an owner of the original, or government, title and a tax title

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holder under the present tax law. See 1 Comp. Laws, § 3927. We hold that, if it has application, defendant is not within its terms. Having no right to possess the premises because of the express legislative prohibition, neither defendant nor her grantor may assert a right to recover in this action for the improvements made upon the land.

There is a further question, not raised or determined in the trial court, which is suggested by the facts, to which question we have called the attention of counsel, who have discussed it in briefs filed since the hearing. It involves the right of the plaintiff to recover the land in this proceeding; it appearing that the State has twice acquired title to the land in tax proceedings which are not assailed, and it not appearing that, before defendant's grantor entered, the land was other than unoccupied and uncultivated. See *White* v. *Dunsmore*, *supra*.

It is said in behalf of plaintiff, and is true, that it does not appear whether plaintiff has paid to the register in chancery the amount necessary to secure a reconveyance of the land. But it cannot be said that the point is not raised by the record. It is assigned as error that the court decided that plaintiff was owner of the premises and entitled to the possession of them. The court did so decide. Upon the record presented we think the ruling of the trial court was erroneous, but for a reason not urged to the trial court. *White* v. *Dunsmore*, *supra*.

The judgment is in all respects reversed, and, as it cannot be said that upon the points decided either party has prevailed, neither will recover costs of this court.

MOORE, C. J., and STEERE, BROOKE, and STONE, JJ., concurred.

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CASE *v.* LONGYEAR.

APPEAL AND ERROR—DEMURRER IN EQUITY—SPECIAL DEMURRER —MULTIFARIOUSNESS.

A demurrer for multiplicity, inconsistency, and insufficiency of a bill to declare certain conveyances given as security for a debt and to redeem therefrom is a special demurrer; and an order overruling it is not appealable.

Appeal from Dickinson; Flannigan, J. Submitted December 11, 1911. (Docket No. 185.) Decided February 10, 1912.

Bill by Sophie L. Case against John M. Longyear and another to declare certain conveyances mortgages and to redeem from them. From an order overruling a demurrer to the bill of complaint, defendant Longyear appeals. Affirmed.

S. W. Shaull (*S. F. Douglass* and *Benton Hanchett*, of counsel), for complainant.

M. J. Sherwood (*Dan H. Ball* and *Allen F. Rees*, of counsel), for defendant J. M. Longyear.

BROOKE, J. This is an appeal from an order overruling a demurrer interposed by defendant Longyear.

The complainant in her bill of complaint sets out a series of transactions between her husband, Julian M. Case (now deceased), herself, and the defendant. It would seem (though we do not now so determine) that the legal effect of all of the averments taken together is to charge that the defendant Longyear now has the legal title to certain lands which he holds as security for the payment of certain moneys advanced by him to Julian M. Case in his lifetime; that he has disposed of certain other lands conveyed to him as security for said loan, the products of which should be credited thereon.

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Complainant prays for an accounting and for permission to redeem. To this bill defendant Longyear demurred for the following reasons:

"(1) The said bill is multifarious.
"(2) The allegations of the bill are repugnant to each other.
"(3) The bill of complaint is a bill with a double and inconsistent aspect.
"(4) The bill of complaint is inconsistent with itself.
"(5) That part of the bill of complaint which alleges and states that the transactions set forth in the bill of complaint between defendant John M. Longyear, Julian M. Case, and the complainant, Sophie L. Case, constituted mortgages or securities for a debt, and that part of the bill stating and alleging a right in the complainant to purchase the interests in lands described in the bill of complaint are inconsistant with each other.
"(6) That part of the prayer of the bill of complaint which asks for relief by way of redemption from the mortgages alleged in said bill to exist is wholly inconsistent with that part of the prayer of the bill of complaint seeking specific performance of the alleged contract to convey.
"(7) That part of the prayer of the bill of complaint asking for specific performance of any alleged contract to convey is wholly inconsistent with the case made by the bill.
"(8) The allegations in the bill alleging that the defendant, John M. Longyear, holds title to the interest in the lands set forth in the bill of complaint as security or under a conditional sale, are inconsistent with and repugnant to the allegations of an alleged valid contract to sell the interest in the said lands to the complainant.
"(9) The allegations of the bill of complaint are insufficient to entitle the complainant to the relief prayed, or any part thereof."

We must hold under the authority of *Kerr* v. *Rupp*, 144 Mich. 269 (107 N. W. 1059), and cases there cited and discussed, that the foregoing demurrer is special, and not general, and therefore that no appeal lies from an order overruling it. Mr. Justice OSTRANDER, speaking for the court, there said:

"The power to dismiss bills for multifariousness has

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always been sparingly exercised. It is proper practice to raise the objection, in the court of original jurisdiction, by demurrer. The matter of proper relief is so completely within the control of the court on final hearing that no hardship is likely to arise from answering over and proceeding to the merits of the controversy, or in standing upon the demurrer and appealing from the final decree."

The order overruling the demurrer is affirmed, with costs to the complainant. Defendant will be be allowed 20 days in which to answer the bill of complaint.

MOORE, C. J., and STEERE and STONE, JJ., concurred. BLAIR, J., concurred in the result.

BROOKS *v.* CULVER.

1. FRAUD — STOCK AND STOCKHOLDERS — DECEIT — SALES — INJUNCTION — PLEDGE — BUYER'S FAILURE TO SHOW RELIANCE ON STATEMENTS.

   Where complainant purchased of defendant stock in a corporation of which complainant later, in pursuance of the design with which he bought the stock, became manager, in defendant's stead, in a suit in equity to enjoin the foreclosure of the stock pledged to defendant to secure a part of the purchase price, the complainant was not entitled to relief upon a record showing that he did not place reliance on the representations of defendant as to the amount of assets, liabilities, and as to the financial condition of the corporation, but acted upon a full investigation and information obtained by other means.[1]

[1] Duty of purchaser of corporate stock to verify statements made as to its financial condition, see note in 14 L. R. A. (N. S.) 1176.

Fraud as a ground of relief from subscription to stock after insolvency of corporation, see note in 31 L. R. A. (N. S.) 900.

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2. SAME—BURDEN OF PROOF—EVIDENCE.

The burden of proof being on complainant to show fraud by clear and conclusive testimony, complainant was not entitled to damages for deceit which he endeavored to establish by his own unsupported testimony, denied by defendant.

Appeal from Marquette; Flannigan, J. Submitted December 11, 1911. (Docket No. 49.) Decided February 10, 1912.

Bill by Arthur Brooks against Rush Culver for an injunction and other relief. From a decree dismissing the bill, complainant appeals. Affirmed.

Ball & Ball, for complainant.

William P. Belden and *W. S. Hill*, for defendant.

STEERE, J. The bill of complaint is filed in this cause to enjoin defendant from selling certain stock in the Northern Lumber Company, pledged by complainant as collateral to his note for $5,833.33, given September 22, 1909, in part payment for said stock; and to obtain a reduction in the amount of said note on the ground that misrepresentations were made by defendant as to the value of the stock for which the note was given.

The Northern Lumber Company is a corporation engaged extensively in logging and the manufacture and sale of lumber at and around Birch, in Marquette county, Mich. It had a capitalization of $300,000, divided into shares of $100 each. It was organized with $200,000 of stock issued and $100,000 of treasury stock. Subsequently about $50,000 of its treasury stock was sold. At the time of the events which resulted in this litigation, the stock was mostly owned by Mr. Miller, Mr. Packer, and Mr. Owlett, of Wellsboro, Pa., and defendant Culver, of Marquette, Mich. Defendant owned 600 shares and was president and general manager of the company, Mr. Owlett was secretary, and Mr. Miller, treas-

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urer. These gentlemen, with a Mr. Townsend, constituted the directors. The Pennsylvania stockholders held a controlling interest in the company. They had become dissatisfied with defendant's management of the business and contemplated a change. To that end they negotiated with complainant, a West Virginia lumberman, to buy an interest in the business and take the management.

It may aid in a better understanding of the case to state that the complainant, Brooks, is a practical lumberman who, previous to his connection with this company, had carried on a similar business in Painesville, W. Va. Messrs. Owlett and Packer are lawyers living at Wellsboro, Pa.; defendant Culver is a lawyer at Marquette, Mich. Mr. Packer, aside from his law practice and his connection with the Michigan company, was also a member of some company doing business in West Virginia; his interests there being, for the most part, looked after by a partner, O'Connor by name. Complainant had slightly known Packer for five or six years from his occasional visits to West Virginia in connection with his interests there. Pursuant to telephone communication from Mr. Packer (presumably from Pennsylvania) and a personal interview the following day with O'Connor at Painesville, W. Va., in which the proposition of becoming business manager of their Michigan lumber interests was "put up" to him, complainant, in June, 1909, made a visit to Birch, Mich., "to see whether he would care to go there." Mr. Owlett, Mr. Packer, and Mr. Miller timed their visit to Birch to be contemporaneous with complainant's. This was the first that complainant had met any of the parties except Mr. Packer. Complainant made a stay of five or six days, looking over the stumpage, the plant, the financial conditions, "outside operations," and general details, getting all the information he could in order to determine whether he should accept or reject the proposal of the Pennsylvania stockholders to buy stock and take charge as general manager. As a result of the visit, he concluded

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to purchase $10,000 of the treasury stock, with an option of $30,000 more by the first of the year, all at par. The money for this $10,000 of stock was sent by complainant to Mr. Owlett, the secretary, the following 1st of August, and the transfer was made at the time of his second visit to Birch in September. At that time complainant went to Birch expecting to supersede defendant and take charge of operations pursuant to an understanding previously reached with the Pennsylvania stockholders.

In April, 1908, Mr. Miller, who was a business man and skilled accountant, went to Birch, in the interest of the Pennsylvania stockholders, where he remained about six months, taking charge of the office, personally going over the books and accounts, and investigating the financial affairs of the company. Messrs. Miller, Packer, and Harrison, who was a partner of Packer, had made periodical trips to Birch, looking after the financial status of the company, and for three years a regular bookkeeper, Claude Ingalls, had been employed, who had entire charge of the books and accounts. Ingalls testifies that Mr. Harrison had been up there in August, 1909, and "was in the office right along three or four days working on the books, making memoranda, taking notes, and asking me questions. I understood he came there to go through the books himself." Mr. Owlett testifies:

"We found a great deal of complaint by people who were dealing with Mr. Culver. There was complaint made that he would sell lumber to parties and degrade it, and we found a good many matters coming up continually that we didn't know anything about, and general loose management. We thought Mr. Culver was a better lawyer than he was a lumberman."

After the transactions of the parties in June, affairs remained about *in statu quo* until the middle of September following, when, as Mr. Packer testifies—

"I and the other Wellsboro stockholders had reached the conclusion that it would be advisable to make Mr. Brooks general manager, if he would assume it."

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Mr. Owlett, secretary of the company, and a witness for complainant, testifies that, based on the general conditions as they had previously found them at Birch, the eastern stockholders had reached the conclusion that it was desirable to make a change in the management; that complainant went there with the idea of assuming the management of the company and taking a large interest in the business if things were as he expected to find them. Defendant was not informed of the proposed change until some time after the arrival of the eastern stockholders at Birch in September, 1909. He objected to resigning unless he sold his stock in the company, and the change of management was postponed for some time while negotiations to that end were going on between defendant and Packer and Owlett. Matters dragged until complainant concluded the change was not likely to take place. He testifies he—

"Told Mr. Packer I didn't think they would go on and change managers. I thought it would be embarrassing for them, the way the thing looked, and they didn't want to do it; they kind of hated to do it, I thought."

Defendant insisted that the whole of this stock should be taken, and Packer and Owlett were trying to adjust the matter amicably by agreeing to take one-half. It was finally arranged that one-half of defendant's stock would be bought at that time. Defendant claims, and testified, that they agreed to take all his stock—one-half then, when he would resign as manager, and the balance within one year. They deny that it was agreed to take more than 200 shares. Be that as it may, defendant resigned the management, and complainant was installed as his successor, complainant taking 100 shares, and Owlett and Packer each 50 shares. Owlett looked after the transfer of the stock. Defendant claims that he sold the stock to Owlett and Packer and did not know how they were to distribute it until the transfer was made after all negotiations were completed.

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Complainant claims that he personally negotiated for the 100 shares of stock and bought the same from defendant, who made various misrepresentations as to the indebtedness of the company and the prices they were getting for lumber, upon which he relied, and by which he was induced to buy the stock. The price paid for this stock was slightly above par. Defendant received through Owlett complainant's check for $5,000, and his note for $5,833.33 payable in three months, with a certificate for the 100 shares of stock, which defendant had assigned to complainant, attached, as collateral security. The note becoming past due and unpaid defendant took steps to sell the stock and realize on the security, whereupon this bill was filed.

The following questions of law and fact are presented by the record: Did defendant negotiate the sale of the 100 shares of stock with complainant, or with Owlett and Packer? Did he make false and fraudulent statements to complainant as to the indebtedness of the company and the prices it was getting for lumber? If so, was complainant, relying on them, deceived and misled and thereby indueed to buy the stock? If so, what is the measure of damages?

That there were protracted negotiations between Owlett and Packer and defendant relating to a change of management and a purchase of defendant's stock, is clearly shown. Owlett testifies:

"I told him (Culver) I would talk to Mr. Packer and Mr. Brooks, which I did, and then Mr. Packer and I went and talked to him and told him that Mr. Brooks would buy $10,000 of his stock, Mr. Packer would take $5,000, and that I would take $5,000."

Complainant arrived at Birch on September 15th and says he agreed to take the stock in question on September 22d, just a week later. In the meantime he had been on the ground, familiarizing himself with the situation. He had previously bought $10,000 worth of stock at par and

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taken an option on $30,000 worth, as the result of his previous investigations and his associations and dealings with the Pennsylvania stockholders, with whom he was allied and with whom he was co-operating to depose defendant from his position as manager of the business. He knew that these stockholders lacked confidence in defendant and were seeking to get rid of him; that, in order to accomplish such result, they were soliciting complainant to buy this stock, the ultimate result of which would be his engagement as manager, in the position vacated by defendant. The significance of this situation of affairs is not only a lack of faith in defendant but a distrust of him.

Assuming that defendant did make the false representations claimed by complainant, it is difficult to believe that, relying upon them, he was thereby deceived and induced to make the purchase. All the surrounding facts and circumstances and relations of the parties naturally, and we think quite clearly, suggest that complainant was led to purchase this stock by his own investigations, supported by the confidence he had in the Pennsylvania stockholders, with whom he had already dealt, and who had shown their confidence by selecting him as their manager, and by his desire to assist them in getting defendant out of the way so that he himself might secure a good position as manager in charge of a large business in which he was already financially interested.

The gist of complainant's right to recover is grounded on the proposition that he was fraudulently induced to purchase this stock through false representations made to him by defendant as to the indebtedness of the company, the amount of its assets, and the condition of its business; that he believed them to be true; that thus believing and relying on them he was thereby deceived and induced to purchase the stock. His testimony in that particular is directly contradicted by the testimony of the defendant. So far as the record discloses, the parties are equally truthful and equally interested.

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The burden of proof is upon complainant. When relief is sought on the ground of fraud, it must be proven clearly and conclusively. It is not lightly inferred, and the defrauded party must have made prompt complaint when the facts came to his knowledge. *Buck* v. *Sherman*, 2 Doug. 176; *Bumpus* v. *Bumpus*, 59 Mich. 95 (26 N. W. 410).

"It is an elementary principle that he who impugns a transaction as fraudulent, which may or may not be so, is not sustained by his own assertion alone in case he is disputed, but has the burden on him to make his allegation good by independent evidence; for he who alleges that a transaction was fraudulent must prove it." *Hutchinson* v. *Poyer*, 78 Mich. 337 (44 N. W. 327).

We think the inference from the independent evidence in this case is that complainant was led to purchase the stock by his own investigations, his desire to become manager of the business, and the representations and overtures of the eastern stockholders with whom he was associated, rather than by anything said or done by defendant. In this view of the case other questions raised by the record become unimportant.

The decision of the circuit judge dismissing complainant's bill is affirmed, with costs.

MOORE, C. J., and BROOKE, STONE, and OSTRANDER, JJ., concurred.

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JOHNSON *v.* SERGEANT.

1. AUTOMOBILES—HIGHWAYS AND STREETS—POLICE POWER—NEGLIGENCE—MOTOR-VEHICLE LAW.
   In the exercise of the police power the legislature is authorized to regulate the operation of automobiles on the public highways.
2. CONSTITUTIONAL LAW—MOTOR-VEHICLE LAW.
   The title of Act No. 318, Pub. Acts 1909, being "an act providing for the registration, identification and regulation of motor vehicles operated upon the public highways of this State," is sufficiently broad to warrant the provision contained in the law rendering an owner liable for the negligent acts of the operator of his car.[1]
3. SAME.
   And it was not beyond the power of the State to make the owner absolutely liable.
4. SAME—ACTIONS—CONDITIONS PRECEDENT.
   The statute does not contemplate that an action should be brought and judgment obtained against the driver of the automobile before the commencement of proceedings against the owner.

Certiorari to Kalamazoo; Knappen, J. Submitted December 8, 1911. (Docket No. 200.) Decided February 10, 1912.

Case by Delos Johnson against George Sergeant and Lewis Sergeant for personal injuries. An order overruling a demurrer to plaintiff's declaration is reviewed by defendant Lewis Sergeant on writ of certiorari. Affirmed.

Cole & Goembel, for plaintiff.

Osborn & Mills, for defendant.

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[1] Liability of owner for negligence of borrower or hirer of automobile, see note in 33 L. R. A. (N. S.) 81.
Responsibility of owner when automobile in charge of another, or when put in operation by another, see note in 1 L. R. A. (N. S.) 235.
Duty and liability of person operating automobile on public street or highway, see note in 4 L. R. A. (N. S.) 1130.

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MOORE, C. J. In 1909 the legislature passed an act entitled "An act providing for the registration, identification and regulation of motor vehicles operated upon the public highways of this State, and of the operators of such vehicles." Act No. 318, Pub. Acts 1909.

Subdivision 3 of section 10 thereof is as follows:

"Subd. 3. Liability of owners. — The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation by any person of such motor vehicle, whether such negligence consists in violations of the provision of a statute of this State or in the failure to observe such ordinary care in such operation as the rules of the common law require; but such owner shall not be so liable in case such motor vehicle shall have been stolen." Act No. 318, Pub. Acts 1909.

In section 1 of the act the word "owner" is defined as follows.

"The term 'owner' shall also include any person, firm, association or corporation renting a motor vehicle or having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days." Act No. 318, Pub. Acts 1909.

The plaintiff bases his cause of action on the provisions of said act. The defendant interposed a demurrer to plaintiff's declaration. This demurrer was overruled.

The claim of the defendant is:

"(*a*) That subdivision 3 of section 10 of the act is unconstitutional.

"(*b*) That the title of the act is insufficient to sustain the constitutionality of subdivision 3 of section 10 of the same.

"(*c*) That the liability attempted to be created by subdivision 3 of section 10 is beyond the authority of the legislature.

"(*d*) That if the act is valid and constitutional, no action or liability arises thereunder, as against the owner of a motor vehicle, until liability for negligence has been established as against the operator of the vehicle."

The diligence of counsel has failed to call our attention to another similar statute. We also have consulted such

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text-books upon the automobile as are in the State law library, and do not find a similar statute.

It is well recognized that the automobile upon the highway in the hands of an incompetent or a reckless driver may result in great injury to persons and property. Because of this fact, the State, in the exercise of its police power, may pass statutes in relation to the ownership of automobiles and the running thereof. Section 32, Berry's Law of Automobiles; section 29, Davids' Law of Motor Vehicles; Huddy on Automobiles (2d Ed.), p. 9; section 26, Babbitt on Law applied to Motor Vehicles; *Commonwealth* v. *Kingsbury*, 199 Mass. 542 (85 N. E. 848, 127 Am. St. Rep. 513); *People* v. *Schneider*, 139 Mich. 673 (103 N. W. 172, 69 L. R. A. 345).

It is said the statute is penal. We again quote from the brief:

"The act is a penal enactment. Public Acts of 1909, 780–782. *People* v. *Steel Co.*, 151 Mich. 619, 620 [115 N. W. 705]. The creation of the civil liability attempted by it is not a mere regulation of the use of motor vehicles or of the operators of such vehicles upon the public highways of this State, and the title is, under familiar decisions and considerations, so defective as to render subdivision 3 unconstitutional. It is sometimes true, of course, that the imposition of the civil liability is in the nature of a regulation. This is not true where the statute is penal in its character. The absolute liability of owners of motor vehicles for the negligence of others is not germane to the subject expressed in the title of the act, and, of course, if this is correct, the enactment, so far as it affects that subject, is unconstitutional."

We think this contention is not well taken. It has been held that the omission from the title of an act, which is passed for the purpose of prohibiting or regulating a business, of a statement that a penalty will follow a violation of the act does not render the act invalid. *Hartford Fire Ins. Co.* v. *Raymond*, 70 Mich. 485 (38 N. W. 474); *People* v. *Miller*, 88 Mich. 383 (50 N. W. 296). See *People* v. *Snowberger*, 113 Mich. 86 (71 N. W. 497, 67 Am.

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St. Rep. 449). In *Westgate* v. *Township of Adrian*, 161 Mich. 333 (126 N. W. 422), many authorities are gathered bearing upon the subject of titles to acts. In that case it was said:

"It will be noted that the original title contains the word 'regulate.' Under that term, very broad powers may be exercised. It means both government and restriction"—citing several authorities.

The title to the act before us has the words "regulation of motor vehicles operated upon the public highways of this State and of the operators of such vehicles." This language certainly suggests to an automobile owner that the provisions of the act were likely to interest him.

The legislature has gone a long way in this statute in fixing the liability of the owner, even though he may not be in fault. We do not think, however, it can be said to have exceeded its authority under the police power. See *People* v. *Snowberger*, *supra*; *People* v. *Grocer Co.*, 118 Mich. 604 (77 N. W. 315); *People* v. *Curtis*, 129 Mich. 1 (87 N. W. 1040, 95 Am. St. Rep. 404); *Burrows* v. *Transportation Co.*, 106 Mich. 582 (64 N. W. 501, 29 L. R. A. 468).

It is said judgment ought to be obtained against the driver of the automobile before bringing action against the owner of the vehicle. No authority is cited upon this proposition. There is no suggestion of that kind in the statute itself, and no good reason has been suggested to us why it should have such a construction.

The judgment of the court below is affirmed, with costs, and defendant is given 15 days after service of notice of this judgment to plead to plaintiff's declaration, if he so desires.

STEERE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. OSTRANDER and BIRD, JJ., did not sit.

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LAXTON v. PATRONS' MUTUAL FIRE INSURANCE CO. OF MICHIGAN, LIMITED.

INSURANCE—MUTUAL BENEFIT ASSOCIATIONS—WAIVER OF BREACH OF INSURED.

Where plaintiff, a member of a mutual fire insurance association, organized to insure members of a grange order in good standing, withdrew from the local grange and ceased paying dues, forfeiture of the policy of insurance according to the strict terms thereof was waived by the insurer which took no action to cancel the policy and continued to receive assessments upon the policy after notice to its secretary of the status of insured.

Error to Ingham; Wiest, J. Submitted December 11, 1911. (Docket No. 186.) Decided February 10, 1912.

Assumpsit by Arthur H. Laxton against the Patrons' Mutual Fire Insurance Company of Michigan, Limited, upon a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

E. C. Chapin and *G. C. Liebrand*, for appellant.

Tuttle, McArthur & Dunnebacke, for appellee.

MOORE, C. J. The defendant is a Michigan corporation, organized under the provisions of Act No. 262, Pub. Acts 1895 (2 Comp. Laws, §§ 7287 *et seq.*), entitled "An act to provide for the incorporation of mutual fire insurance companies, limited, and defining their powers and duties."

On December 20, 1905, the plaintiff applied for insurance on certain personal property. He was then a member of the order Patrons of Husbandry, in good standing in Grange No. 874. On January 17, 1906, a policy was delivered to him. The rule as to membership is stated in article 2 of the articles of association as follows:

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"This company is formed for the mutual protection of its members who are members in good standing in the order Patrons of Husbandry, for the purpose of mutual insurance of their property against loss by fire or damage by lightning, which property to be insured may comprise grange halls, dwelling houses, etc., belonging to members of said company."

At some date after the policy was issued, probably about two or three years before the fire, the plaintiff took either a demit or withdrawal card from said Telephone Grange, and from then on, and up to the time of his fire, he did not present his demit to any other grange, and paid no grange dues.

Mr. Van Auker was appointed collector of the local grange, and had knowledge of what was done by the plaintiff; and it was the claim of the plaintiff that Mr. Van Auker communicated his knowledge to the secretary of the company. The defendant denies the latter contention. The plaintiff continued to pay his assessments to the defendant company, including one assessment after the fire which resulted in a loss to the plaintiff, for which this suit is brought. The fire occurred July 28, 1909. After the fire, some correspondence occurred between the plaintiff and the secretary. Later a personal interview was had between them, when the secretary advised the plaintiff that the defendant would not pay his loss, because the insured had not paid his dues to the grange at the time of the fire.

The defendant retained all the assessments paid to it, and still retains them, except the assessment which was made and paid about two months after the fire, and after defendant knew all the facts. As to this assessment, the defendant sent a check for the amount thereof to the plaintiff on November 8, 1909. Upon the trial, this check was tendered back to the attorney for the defendant, who declined to receive it.

This suit was brought December 10, 1909. Mr. Laxton's policy was canceled in January, 1910. The case

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was tried before a jury, which returned a verdict in favor of the plaintiff. The case is brought here by writ of error.

It was the claim of defendant that, because plaintiff had taken a demit from the local grange, and had not paid dues to the grange for more than six months before the fire occurred, this avoided the policy. The plaintiff makes two answers to this contention: *First*, that the defendant, through its secretary, had knowledge of what was done by the plaintiff, and did not cancel the policy. *Second*, that, after this knowledge came to it, the defendant assessed plaintiff, collected the assessments, and still retains them. It was the idea of the trial judge that these various contentions presented questions for the jury.

The first claim of defendant demanding attention is as follows. We quote from the brief:

"On the direct examination of plaintiff, he testified he had paid assessments every year since he received his policy. This is not disputed; but there is no evidence in the case, or any claim made, that the plaintiff ever advised the defendant of his withdrawal from the grange and nonpayment of grange dues."

This claim is somewhat anomalous, in view of what was done upon the trial when defendant asked the trial court to submit to the jury a special question, which, with its answer, reads as follows:

"Was Mr. Holden notified by Mr. Van Auker that Mr. Laxton had withdrawn from the grange?
"*Answer:* Yes."

It would do no good to set out in detail the testimony bearing upon this question; but we shall content ourselves with saying that it presented an issue for the jury, which found against the claim of defendant.

It is now urged that the secretary of the company could not waive the forfeiture. It is hardly necessary to set out verbatim the provisions which apply to this phase of the case. The fact is not in dispute that after it is claimed the policy became void, and after, according to the find-

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ing of the jury, the secretary had notice of the facts, that assessments were made and collected, which assessments are yet retained by the defendant. Under these circumstances, we think the judgment should stand under the following authorities: *Olmstead* v. *Insurance Co.*, 50 Mich. 200 (15 N. W. 82); *Towle* v. *Insurance Co.*, 91 Mich. 219 (51 N. W. 987); *Lord* v. *Protective Society*, 129 Mich. 335 (88 N. W. 876); *Hogadone* v. *Insurance Co.*, 133 Mich. 339 (94 N. W. 1045); *Reimold* v. *Insurance Co.*, 162 Mich. 69 (127 N. W. 17).

Judgment is affirmed.

STEERE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. OSTRANDER AND BIRD, JJ., did not sit.

EARLY *v.* INGHAM CIRCUIT JUDGE.

EXECUTION— ARBITRATION— RECALL OF PROCESS— EQUITY— SETTING ASIDE AWARD—MANDAMUS.

On motion to recall execution issued upon a judgment entered after an award in arbitration proceedings, which the defeated party had attempted to set aside in equity by bill for an injunction and other relief, it was not an abuse of discretion to refuse to recall the process; the causes may be permitted to proceed collaterally, although the proceedings at law may be set aside by decree in the chancery case.

Mandamus by Thomas Early and another against Howard Wiest, one of the circuit judges for the county of Ingham, to compel respondent to recall an execution issued upon a judgment in arbitration proceedings. Submitted December 8, 1911. (Calendar No. 24,777.) Writ denied February 10, 1912.

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Tuttle, McArthur & Dunnebacke, for relators.

Thomas, Cummins & Nichols, for respondent.

MOORE, C. J. This case has been here before. It is reported in 166 Mich. 517 (131 N. W. 1104). A reference to that opinion will make a long statement here unnecessary. The opinion was handed down July 5, 1911. On July 17, 1911, the award was confirmed, and a judgment entered thereon. August 24, 1911, an execution was issued and placed in the hands of the sheriff for collection. The relators then made an application to the respondent, asking that the execution be recalled until the chancery case should be heard. The respondent denied the motion, and it is this action which is sought to be reviewed by mandamus.

The argument of counsel may be summarized as follows:

"(1) That every court has the inherent right and authority to control its own process, in order to prevent an abuse thereof.

"(2) That the issuance of an execution upon the judgment, and the threatened levy upon relators' property, was an abuse of process.

"(3) That respondent was therefore guilty of an abuse of discretion in refusing to recall the execution, which refusal ought to be relieved against by the issuance of a writ of mandamus."

Counsel are agreed upon the first of these propositions; but the other two are not acceded to. It is insisted by counsel for respondent there was no abuse of process or of discretion which calls for action by this court. We do not think any new principle of law has arisen in the case since it was here before. As the case now presents itself, we think it might have been well for the court below to delay confirmation of the award, entry of the judgment, and issuance of the execution until the chancery case was heard; but for reasons which doubtless appealed to him he did not do so. What was said by Justice OSTRANDER when the case was here before is still true:

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"However, there appears to be no legal objection to the prosecution of proceedings, on the one side to enforce, and on the other to set aside, an award, although manifestly action at law to enforce the award is at peril of having the award set aside in equity. It is not made to appear that relators, complainants in equity, will suffer injury if the award is confirmed. We may assume that proceedings will be so controlled that neither party will be damaged."

The writ is denied.

STEERE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. OSTRANDER and BIRD, JJ., did not sit.

STANTON v. FOLEY.

1. NEW TRIAL—JUDGMENT—WEIGHT OF EVIDENCE—CIVIL-DAMAGE ACTION.
   Where plaintiff was entitled to a verdict for some amount, by the great weight of the evidence, in a civil-damage action, the court exceeded its authority in denying a new trial in case defendant should pay the costs and an attorney's fee to plaintiff.

2. SAME—INTOXICATING LIQUORS—EVIDENCE.
   The verdict being contrary to the clear weight of the evidence, plaintiff was entitled to have a jury pass on the amount of damages, even though the testimony as to the same was meager.

Error to Cass; Des Voignes, J. Submitted January 10, 1912. (Docket No. 41.) Decided February 10, 1912.

Case by Ella M. Stanton against Bart Foley and another for unlawful sales of intoxicating liquors to plain-

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tiff's husband. Judgment for defendants. Plaintiff brings error. Reversed.

Carr & Eby, for appellant.

Thomas J. Cavanaugh and *James H. Kinnane*, for appellees.

STONE, J. This is an action on the case, under the statute, in which the plaintiff, a married woman, seeks to recover damages against Bart Foley, a saloon keeper, and the Michigan Bonding Company, his surety, for the selling, giving, and furnishing of spirituous and intoxicating liquors to her husband, by said Foley, between the 1st day of May, 1909, and the 1st day of May, 1910; the plaintiff claiming that her husband was then a person in the habit of getting intoxicated, and that whisky and beer were sold, furnished, given, and delivered by said Foley personally, in his saloon and in other places, while plaintiff's husband was intoxicated, and after said defendant was verbally forbidden so to do; also, that liquor was furnished by Foley's agents and bartenders. There was a good deal of evidence offered and received tending to support the declaration. There was evidence that on one occasion the plaintiff found her husband very drunk in Foley's saloon, and saw Foley furnish him with liquor while in that condition; that the plaintiff interfered and knocked the glass out of her husband's hand; that, in the presence of a number of persons, her husband swore at her and made an assault upon her; and that he was grabbed and held by a person present, which prevented the husband from getting hold of her. This is one of the many instances testified to by the plaintiff and other witnesses. The defendants claimed that plaintiff's husband had been a hard drinker during all of his married life. This was denied by the plaintiff, who claimed and testified that her husband had reformed prior to going on the Foley farm in the spring of 1908, and that she did not observe that he was drinking again until the fall of 1908.

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There was a good deal of conflict in the testimony. The case was submitted to a jury by the trial judge under a very full charge, and a verdict was returned for the defendants. There was a motion for a new trial by the plaintiff, in which, among other things, it was claimed that the verdict was contrary to the evidence and contrary to the law and instructions of the court. In denying the motion for a new trial the circuit judge said, in part:

"There was abundant evidence upon the question of unlawful sales. But it must be conceded that likewise the evidence bearing upon the damages sustained was very meager. The evidence submitted in this case might impress any fair jury as being weak upon the element of damages, and, had the jury returned a verdict of six cents damages, I would not feel like disturbing the verdict. The unlawful sales were shown without doubt and clearly beyond cavil. So patent was the weight of the evidence on this issue to defendants' counsel that in their arguments to the jury they practically admitted 'that plaintiff was entitled to a judgment of six cents, but contended that under the evidence it should not exceed that sum.' The plaintiff was required by this court to give security for costs upon a motion made by the defendants' counsel about the time the case was instituted. She is a poor woman, having no property aside from the little home in which she lives. Under the weight of evidence, plaintiff was entitled to a verdict in at least the sum of six cents, thereby carrying costs of the case. I am therefore of the opinion that a new trial should be granted, and the same is hereby ordered, provided the defendant may within 30 days from and after the filing of this opinion elect to and file in writing a disclaimer and satisfaction for all costs incurred on his behalf herein, and pay to the clerk of this court for use and benefit of plaintiff an attorney fee of $30, witness fees of $15, the jury and stenographer's fees of $3, and a clerk's fee of $6, or a total of $54, and thereupon no further or other proceedings may be had hereon."

The defendants within the 30 days filed a written disclaimer and satisfaction with the clerk of the court, in accordance with the order of the circuit judge denying the motion, and also tendered to the attorneys for the plaintiff $54, which was refused. Thereupon said amount was

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paid to the clerk of the court for the plaintiff. A judgment having been entered for the defendants, the plaintiff has brought the case here upon a writ of error, assigning many errors in the rulings relating to the admission of testimony, refusals of the court to charge as requested, the charge of the court, and the denial of the motion for a new trial.

An examination of the record fails to disclose any reversible error in the rulings relating to the admission of evidence.

While there is some apparent conflict between some of the defendants' requests to charge as given, and the general charge of the court, especially as to defendants' sixth and seventh requests, we are of opinion that this will be avoided upon another trial, and we do not think it necessary to make further reference thereto.

We are all of opinion, however, that the court should have granted the motion for a new trial, and that the disposition made of the motion was improper, and was without authority for the reasons pointed out in the cases of *Lorf* v. *City of Detroit*, 145 Mich. 265 (108 N. W. 661), and *Goldsmith* v. *Railway*, 165 Mich. 177 (130 N. W. 647).

We are also of opinion that the verdict was against the clear weight of the evidence, as found by the circuit judge. The plaintiff has the right to insist that the jury shall assess her damages.

The case is reversed, and a new trial ordered.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

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CLARK v. DETROIT UNITED RAILWAY.

STREET RAILWAYS — NEGLIGENCE — CARRIERS — ALIGHTING FROM CAR—HIGHWAYS AND STREETS—CONTRIBUTORY NEGLIGENCE.

A passenger who, on alighting from a west-bound car and crossing the first of the defendant's double tracks, looked west and saw no car, but stepped upon the second or east-bound track without again looking and was struck by a car coming from the west which there was nothing to prevent her from seeing except the car from which she alighted, was guilty of contributory negligence as a matter of law.[1]

Error to Wayne; Donovan, J. Submitted January 10, 1912. (Docket No. 35.) Decided February 10, 1912.

Case by Sarah Clark against the Detroit United Railway for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

J. Emmet Sullivan, Alex C. Bishop, and *Thomas J. Mahon,* for appellant.

Corliss, Leete & Joslyn (*A. B. Hall,* of counsel), for appellee.

OSTRANDER, J. Plaintiff's testimony (no other was introduced) tended to prove that she alighted from a west-bound street car at the corner of Michigan avenue and Fifth street in the city of Detroit, passed in the rear of the car across the street, and was struck and injured by an east-bound car running on a parallel track. The tracks are separated by a space of five feet. She alighted on the north side of the north, or west-bound, track. She stood there until the car from which she had alighted had proceeded some distance—she at first testified that it was 3

[1] Duty to stop, look, and listen after entering on first track, see note in 17 L. R. A. (N. S.) 505.

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or 4 feet, and, later, 15 feet—when she looked to the west, was able to see down the track about 125 feet, saw no approaching car, and thereupon, without again looking for a car, proceeded to cross the street.

"*Q.* Just before you stepped on the track you did not look west?

"*A.* I looked west before I started to cross the first track.

"*Q.* But when you came to go across the south track, when you came to the south track, you were not looking west; if you had you would have seen the car, would you not?

"*A.* Certainly I would.

"*Q.* So that just before you stepped on the south track you were looking right straight ahead?

"*A.* Yes, sir.

"*Q.* And if you had looked west you would have seen the other car as the other person did?

"*A.* If they had rung the bell.

"*Q.* If you had looked west before you stepped on the track, you would have seen the car, so that you were not looking that way?

"*A.* I was not looking west.

"*Q.* If you had looked west just before you stepped on to the south track, you would have seen the car?

"*A.* Certainly I would. * * * When I got right into the second track some persons hollered, and I looked over my shoulder, and the car was on top of me, and I stepped back to save me from getting under the car."

There was nothing obstructing her view to the west except the car from which she had alighted. Assuming that defendant was negligent in the operation of the car, it is clear that plaintiff failed to exercise ordinary care for her own safety. *McCarthy* v. *Railway Co.*, 120 Mich. 400 (79 N. W. 631); *Davis* v. *Railway*, 162 Mich. 240 (127 N. W. 323). See *Manos* v. *Railway*, *ante*, 155 (130 N. W. 664).

The court below properly directed a verdict for defendant, and the judgment for defendant is affirmed.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred. BIRD J., did not sit.

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BRASCH v. BRASCH.

1. DIVORCE—ESTATE BY ENTIRETY—HUSBAND AND WIFE—JURISDICTION TO AWARD ALIMONY.

While the court in a divorce suit has authority to award alimony out of real property owned by the entirety, the interest of the wife cannot be diminished. 3 Comp. Laws, § 8640.

2. SAME—DECREE—STATUTES.

A sum in excess of the value of the wife's interest will be presumed to have been awarded in lieu of dower under Act No. 259, Pub. Acts 1909.

3. SAME—ALIMONY—SUFFICIENCY.

Twelve hundred dollars awarded to the wife in gross is not inadequate out of property of the husband and out of the joint estate to neither of which had the wife contributed, where the entire property was worth about $5,000, was subject to certain mortgages aggregating $900, and where the husband was much older than the wife and had six children dependent on him.

4. SAME—DECREE—LIEN—MORTGAGE.

But it was not a proper method to secure the payment of alimony to decree that the husband execute a second mortgage, maturing in three years at six per cent. interest, upon the joint estate; in lieu whereof it is ordered that the alimony be paid in sixty days, and that it constitute a lien on all the real and personal property.[1]

Appeal from Wayne; Donovan, J. Submitted January 10, 1912. (Docket No. 29.) Decided February 10, 1912.

Bill by Siegmund C. Brasch against Charlotte Brasch for divorce. Upon a cross-bill filed by defendant a decree of

[1] Validity of provision in decree for alimony declaring a lien on husband's personalty, see note in 30 L. R. A. (N. S.) 1062.

Money decree for permanent alimony or separate maintenance as lien on real property, see note in 25 L. R. A. (N. S.) 132.

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divorce was awarded her and from the alimony fixed she appeals. Modified and affirmed.

H. H. Greenberg and *Geo. X. M. Collier*, for complainant.

Sloman & Sloman, for defendant.

BROOKE, J. This is a divorce case in which defendant and cross-complainant secured a decree upon the ground of extreme cruelty. She has appealed from that portion of the decree fixing alimony, which is as follows:

"And it is further ordered, adjudged, and decreed that the said Siegmund C. Brasch pay to the said Charlotte Brasch the sum of $1,200 in manner following: He shall execute at once a second mortgage to be paid on or before three years from date, with 6 per cent. interest, payable semi-annually, and the said Siegmund C. Brasch shall have the right to pay the entire sum at any time before said three years at his option. Said second mortgage shall be given upon the real estate now owned by complainant and defendant jointly, described as follows: Lot No. 12 of J. W. Johnson's subdivision of Brevoort farm north of Michigan avenue, being the eastern five-twelfths part of private claim No. 20, being in the city of Detroit, Wayne county, Mich."

The parties were married in August, 1908. Within one month the wife left, or was compelled to leave, her husband, and remained away from him nearly three months, during which time she filed a bill for divorce against him. This cause was adjusted between the parties, and she returned to her husband in December, 1908, and marital relations were resumed. At the time of her return her husband caused the title to a certain piece of real estate, located upon Michigan avenue, to be placed in the names of himself and wife as tenants by the entirety. The parties lived together on this occasion until July, 1909, a period of about six months, since which time they have been separated. The entire estate owned by the husband at the time of the decree had been accumulated by

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him prior to his marriage with the cross-complainant. It was found by the circuit judge (and with this finding we agree) to consist of the following items: (*a*) The Michigan avenue property, the title to which was held by the entirety, worth $3,000 and subject to two mortgages, aggregating $900. (*b*) A contract interest in a house and lot on Henry street upon which complainant had paid $1,800; (*c*) Personal property of the value of $232.

Deducting the amount of the mortgage from the value of the Michigan avenue property, a balance of $2,100 is found, in which the wife has a one-half interest, which may not be diminished in this proceeding. *Brown* v. *Brown*, 144 Mich. 654 (108 N. W. 288); *Delor* v. *Delor*, 159 Mich. 624 (124 N. W. 544).

The court had authority to deal with the property held by the entirety under 3 Comp. Laws, § 8640. *Jeske* v. *Jeske*, 147 Mich. 367 (110 N. W. 1060).

There being a sum included in the decree in excess of the value of the estate owned by the wife in the realty, it may be presumed that that sum was added in lieu of dower, in accordance with the provisions of section 1, Act No. 259, Pub. Acts 1909.

It is urged by counsel for appellant that the provision made in the decree is grossly inadequate. We are of opinion that it is a just award when due consideration is given to all the facts. In the first place, the wife in no wise contributed to the accumulation of any part of the estate; secondly, she is still a young woman unincumbered by children, thirdly, the husband is much older and has dependent upon him for support six children, all minors. *Cummings* v. *Cummings*, 50 Mich. 305 (15 N. W. 485).

While the amount of the award is not open to criticism, the time of its payment and the method of securing it adopted by the court should, we think, be changed. A decree will be entered in this court fixing the title to the Michigan avenue property in the husband alone. The award of $1,200 shall be paid within 60 days from the entry of the decree, and the amount thereof shall consti-

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tute a lien upon all the real and personal property of the complainant. A solicitor's fee of $35 in addition to taxable costs is allowed to appellant.

MOORE, C. J., and STEERE, MCALVAY, BLAIR, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

McINTIRE *v.* CARR.

APPEAL AND ERROR — CORRECTION OF BILL OF EXCEPTIONS — MOTIONS—SUPREME COURT—PRACTICE—MANDAMUS.

The proper practice to review the action of the circuit court in refusing to include in a bill of exceptions matter desired by appellant is by proposing an amendment to the bill as settled and reviewing by mandamus the refusal of the judge. It is not a correct method to move to remand the record for correction after the issuance of a writ of error.

Assumpsit by Arthur F. McIntire against Henry W. Carr. On motion of appellant to remand the record for amendment and correction. Submitted January 19, 1912. (Calendar No. 24,867.) Motion denied February 10, 1912.

John A. McKay, for the motion.

Beach, O'Keefe & Rockwith, contra.

BROOKE, J. A motion is made in this case by the appellant to remand the record for correction and amendment in certain specified particulars

It appears that in settling the bill of exceptions the circuit judge omitted to include therein certain matter which counsel for appellant believed to be material. To this ac-

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tion of the court appellant excepted, but took no steps to review such action. He caused the bill of exceptions, as settled and signed by the judge, to be printed and the record to be filed in this court. He now asks us to remand that record for amendment. We do not understand this to be proper practice. A party aggrieved by the action of the circuit judge in settling a bill of exceptions should make a motion in the court below that the bill be amended in the desired particulars. Upon the denial of such motion, the action of the circuit court may be reviewed in this court by mandamus. *Crane* v. *Wayne Circuit Judge*, 24 Mich. 513, 3 Cyc. p. 52, and cases cited in note 48. If this course is followed, this court, upon consideration of the return to the order to show cause, is enabled to act intelligently, otherwise such action is not possible.

Touching the present application, from an examination of the proposed amendments in connection with the printed record now on file in this court, it would seem that the omitted matter, if it had been included in the bill of exceptions, would in no respect aid this court to a proper understanding of the questions involved.

The motion is denied, with costs.

MOORE, C. J., and STEERE, MCALVAY, BLAIR, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

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OSTERHOUS, *ex rel.* VANDER VEEN, *v.* VAN DUREN.

1. QUO WARRANTO—PUBLIC OFFICERS—JUSTICES OF THE PEACE—TIME TO INSTITUTE PROCEEDINGS.

   Proceedings in the nature of quo warranto to test title to public office should be commenced before the term has expired or is near the time of expiration, although if commenced seasonably the action may be prosecuted to final judgment after the term has expired, for the recovery of damages or costs claimed by relator.

2. SAME.

   Since the court will exercise its discretion to proceed to final judgment after the term of office, only in case public interests require it, a demurrer to an information in the nature of quo warranto was rightly sustained where respondent's term of office as justice of the peace expired July 4, 1911, and the proceeding was not instituted until June 22, 1911.

Error to Ottawa; Padgham, J. Submitted January 12, 1912. (Docket No. 56.) Decided February 10, 1912.

Information in the nature of quo warranto by Louis H. Osterhous, prosecuting attorney of Ottawa county, on the relation of Engbertus Vander Veen, against Arthur Van Duren to test the title of respondent to the office of justice of the peace. An order sustaining a demurrer to the information is reviewed by relator on writ of error. Affirmed.

M. A. Sooy (*Lillie & Osterhous*, of counsel), for appellant.

Diekema, Kollen & Ten Cate, for appellee.

STONE, J. This was a proceeding by information in the nature of a quo warranto to inquire by what right the respondent held the office of justice of the peace. The

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information was filed and summons issued on June 2, 1911.

The information alleges:

First. That Arthur Van Duren, of the city of Holland, for the space of 25 months last past, had held, used, and exercised, and still did hold, use, and exercise, the office of justice of the peace without any legal election, appointment, warrant, or authority whatsoever therefor.

Second. That at the election of 1907 said Arthur Van Duren was duly elected to said office of justice of the peace, which office he duly accepted, and duly qualified and exercised the functions thereof.

Third. That on the first Monday in May, 1909, said respondent was elected by the common council of the city of Holland to the office of city attorney, which office he accepted, and that on May 1, 1910, he was again duly elected to said office, and again qualified, and exercised the functions of said office until the first Monday of May, 1911.

Fourth. That said Arthur Van Duren again assumed the functions of said office of justice of the peace, and that since the first Monday of May, 1911, he had usurped, intruded into, and unlawfully held and exercised the functions of said office of justice of the peace. Respondent's term of office as justice of the peace expired on July 4, 1911.

To this information, on June 22, 1911, the respondent demurred upon the following grounds:

(1) That relator had been guilty of such laches and such unreasonable delay in filing an information as to be barred from the relief he seeks.

(2) Because the relator has waited with the filing of his information until a time when the right of respondent to hold the position of justice of the peace in the city of Holland has so nearly expired that the inquiry would be of no effect, the term of office of said respondent as such justice expiring on July 4, 1911.

(3) That no substantial benefit would inure to relator by the granting of the petition, and the term having expired, or nearly so, the information is filed simply to try the abstract title to the office.

(4) Because it appears from the said information that

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respondent was duly and legally elected as a justice of the peace in 1907, and no legal act is shown whereby he has forfeited his right to said office.

(5) Because the office of city attorney of the city of Holland is not incompatible with the holding of the office of justice of the peace, nor does the information allege that the office of justice of the peace was vacated by reason of accepting the said office of city attorney.

The case was heard before the circuit court in August, 1911, after the term of office of said respondent as justice of the peace had expired, and the demurrer was sustained, and the information was dismissed. The relator has brought the case here by writ of error.

It will be noticed that the information does not aver that the relator or any other person was claiming the office of justice of the peace, but the proceeding purports to have been instituted in the public interest for the sole purpose of ousting respondent.

Ordinarily proceedings to try title to a public office cannot be brought after the term has expired, or when it is so nearly expired that the inquiry would be of no effect; but an action commenced during the term of office may be prosecuted to final judgment after the expiration of the term, for the recovery of damages or costs which relator has sustained or incurred by the wrongful assumption of authority. 32 Cyc. p. 1432, and cases cited, including *People* v. *Hartwell*, 12 Mich. 508 (86 Am. Dec. 70). But nothing of that nature is claimed here.

Where no substantial benefit would inure to the relator, the proceeding will not as a general rule be continued after the term has expired merely to try the abstract title to the office. *State* v. *Porter*, 58 Iowa, 19 (11 N. W. 715). In the cited case, when it came on for hearing in the district court, it was suggested to the court that the term of office in dispute had expired. The court thereupon dismissed the case. The supreme court held that, the term of office having expired, no relief should be granted, and said:

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"Courts are not organized for the purpose of determining mere abstractions. The court ought not to be required to spend its time in the accumulation of a bill of costs, for no other purpose than that of determining which party should pay them. As no vital question remained for determination, the further prosecution of the case would have been vexatious and unjust."

This court has held that in the case of an intrusion upon an office the court has discretion to proceed to judgment or not according as the public interests do, or do not, require it, and will not do so where no good end will be subserved by it. *People* v. *Nappa*, 80 Mich. 484–488 (45 N. W. 355); *Vrooman* v. *Michie*, 69 Mich. 42 (36 N. W. 749).

We think that this is a case for the application of the above-stated rule, and the judgment of the circuit court is affirmed, with costs against the relator, Vander Veen.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

CLAIR v. BATTLE CREEK JOURNAL CO.

1. LIBEL AND SLANDER—JUSTIFICATION—PRIVILEGE—NEGLIGENCE—NEWSPAPERS.

   In an action for libel, defendant, a newspaper, was not privileged on the ground that it made inquiry before publishing the objectionable article in which plaintiff was charged with murder and marital infidelity; it appearing that inquiry was made of the local police officials who knew nothing about the facts.

2. SAME.

   The article was actionable *per se*.

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3. SAME—DAMAGES—NEW TRIAL—EXCESSIVE VERDICT.
The court, on appeal, will not set aside a verdict on the ground that it was excessive unless satisfied that the result was reached as a consequence of gross error, passion, bias, or corruption.

4. SAME—WORDS LIBELOUS PER SE.
General damages for injury to plaintiff's reputation, feelings, etc., are allowable without proof of special injury from words libelous *per se*, and as bearing on the amount the recklessness or care of defendant in publishing the statements complained of was a proper subject of consideration by the jury.

5. SAME—GOOD FAITH—MITIGATION OF DAMAGES.
Defendant's alleged good faith did not affect plaintiff's right to compensation for injury to feelings and reputation.

6. SAME.
And a verdict of $1,500 was not so excessive as to require the granting of a new trial.

Error to Calhoun; North, J. Submitted January 24, 1912. (Docket No. 45.) Decided February 10, 1912.

Case by Myrtle Clair against the Battle Creek Journal Company for libel. Judgment for plaintiff. Defendant brings error. Affirmed.

D. C. Salisbury and *Burritt Hamilton*, for appellant.

James M. Powers and *Palmer & Palmer*, for appellee.

STONE, J. This is an action on the case for libel, in which the plaintiff recovered a verdict for $1,500, of which $500 was for damages to the plaintiff's feelings, and $1,000 for damages to plaintiff's reputation.

There was a motion by defendant for a new trial, one ground of which was that the verdict was excessive. The motion was denied by the circuit judge, who stated in his reasons filed that in his opinion the verdict was not excessive in amount. This refusal was duly excepted to by the defendant. Upon a judgment having been entered for the plaintiff, the defendant has brought error.

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The only assignment of error urged in this court by defendant in its brief and in the oral argument of counsel is:

"That the trial court erred in denying defendant's motion for a new trial, and in holding that the verdict rendered by the jury was not excessive in amount."

The article published by the defendant in the Battle Creek Journal of December 1, 1908, and complained of, is as follows:

"Marshall Murderess. Had Checkered Career. Woman Arrested in Los Angeles for Killing Street Car Conductor Known. Wanted to Marry Him. Secures a Divorce for That Purpose and Very Much Disappointed.

"The news of a double tragedy in which a former Marshall girl committed a double crime was received here Sunday. Mrs. Myrtle Clare, aged twenty-six and formerly Miss Myrtle Colby, of Marshall, shot and mortally wounded John L. Lambert, a street car conductor, then killed herself in a rooming house in Los Angeles, Cal., Thanksgiving Day. Lambert was taken to a hospital where he died. Miss Colby lived in Marshall about ten years ago. She came to that city from Springport, and was a rather attractive young woman. She worked for Chas. A. Kilbourne, who conducted a restaurant in a building now occupied by Jarius Raub, and resided in a West State street building. From there she went to Jackson. She was married to Ira Clare of Coldwater, Mich., and a few years ago and soon after the couple went west, where Mr. Clare secured a position with the Los Angeles Ice and Cold Storage Co. It is said that their married life was not as happy as it might have been and Mrs. Clare became acquainted with Lambert, a married man who had separated from his wife. Mrs. Clare applied for a divorce from Clare, intending to marry Lambert. Her sentiments were not reciprocated very cordially by the Street Car Conductor, and it is believed the deed was inspired by desperation over the marital complications. It is said Lambert had a divorce, and that Mrs. Clare could not secure one, hence the crime."

The defendant gave notice, under its plea of the general issue, that at the time of the publishing of said article it was its duty to gather and publish items of news and in-

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terest, and that in the regular course of its business said news item was clipped and taken from an article appearing in the Marshall Chronicle, a newspaper published at the county seat of Calhoun county, the then home of said plaintiff, as other articles are clipped from other papers of said defendant's exchange list throughout the State, in its regular course of business; and that said defendant published the same in good faith, without malice toward the plaintiff or any other person, and in pursuance of a duty owing to the public at large; that the plaintiff did not, before bringing suit, give notice to the defendant to publish a retraction, and did not allow the defendant a reasonable time to make such retraction, and make such amends as were reasonable under the circumstances of the case.

It appeared upon the trial that similar articles had been published in a California newspaper and in six other Michigan newspapers, including the Marshall Daily Chronicle. It also appeared that the article published by the defendant differed in many respects from the article published by the Marshall paper, especially in that the article published by the defendant gave correctly the age of the plaintiff, and correctly stated that plaintiff came from Springport. No retraction was ever demanded by the plaintiff, and defendant's attention was not called to the matter until a year after the publication, when this suit was commenced. The plaintiff spells her name "Clair" and never went under the name of "Clare." She is the divorced wife of Marshall A. Clair, and never knew any such person as Ira Clare. She was never employed by, and never knew, Chas. A. Kilbourne. Her maiden name was Myrtle Colby. She was born in Springport, Mich., and resided there until she reached the age of 17 years. She then went to Marshall, where she remained about one year. She afterwards resided in Jackson, Detroit, Battle Creek, and Coldwater, in this State. At the last-named place, she was married to Marshall A. Clair in February, 1907, and the same spring they moved to Monrovia, Cal., where they lived until

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about July 15, 1907, when they separated, and plaintiff's husband returned to Michigan. In September, 1907, she went to Los Angeles, Cal., where she worked in a laundry until about the 1st of April, 1908, when she went to Tonopah, Nev., where she worked until about the 1st of August, 1908, when she went to Seattle, Wash., where she had resided with her mother and stepfather down to the time of the trial. Plaintiff secured a divorce from her husband at Seattle, Wash., in January, 1910, on the grounds of nonsupport and desertion. At the time of the publication complained of, plaintiff was at her stepfather's ranch near Aberdeen, Wash.; she had been away from Los Angeles upwards of seven months. During the greater part of the time since leaving Springport, the place of her birth, she has been a wage-earner in various industrial pursuits, principally in laundries.

The plaintiff testified that she intended to make Seattle, Wash., her permanent home. She received a clipping containing the article complained of; it was sent to her by mail. She received letters from friends in Michigan and Wisconsin, relating to the article. She testified:

"My feelings were somewhat shattered when I read this article. At that time, I was visiting at my stepfather's ranch, and I told my friends and acquaintances about it, and showed them the clipping. It wasn't the article I cared so much about, as it was the imputation that I had committed a crime. * * * I was affected in my feelings upon receiving those letters and the information from the public of this article complained of, of course. I could not state just exactly how I felt. I was at first very much surprised, and then, of course, I felt that I never would care to come back here while it was talked about, and while it was charged to me."

She testified that she never knew anybody in Los Angeles by the name of John Lambert, a street car conductor.

The article in question charged the plaintiff (if she was the person intended, which was a question for the jury), not only with the heinous crime of murder, but that she

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became acquainted with Lambert, a married man who had separated from his wife; and that plaintiff applied for a divorce from her husband, intending to marry Lambert. Other witnesses testified that they read the article in the Battle Creek Journal, and that they discussed it and believed it, and that they believed that it referred to the plaintiff. The issue containing the article complained of had a circulation of 2,279 copies, principally in Calhoun county. A few copies went into adjoining counties; and there was a limited exchange of newspapers throughout the State of Michigan. It must be conceded that the words complained of are actionable *per se*.

Counsel for defendant claim that the publication was an honest mistake, made in an honest attempt to enlighten the public, and that in such a case damages should be reduced to the minimum, and they cite the cases of *Bailey* v. *Publishing Co.*, 40 Mich. 251; *Finnegan* v. *Free Press Co.*, 78 Mich. 659 (44 N. W. 585).

In view of this reference to "an honest attempt to enlighten the public," we cannot overlook the testimony of the city reporter of the defendant, who furnished the article in question, which in the publication was not credited to any other paper. This city reporter testified as follows:

"We try to print the truth. I don't know as I devoted two or three hours to the investigation of the truth of this item. I should judge half an hour, possibly more. I remember I made as complete an inquiry in regard to the item as I could through the local police officials here. * * * I went in person to the police department, and my impression is I saw the desk sergeant; he said he knew nothing about it, and I inquired of the chief, too, and he did not know anything about it. And with the statement that they knew nothing about it, well, it was published."

In these days of telegraph and telephone communication, the inquiry might well have gone further.

It is admitted that the law presumes damages where the words are actionable *per se;* and that the amount of these damages rests primarily in the sound discretion of

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the jury, under a proper charge from the court. No error is assigned upon the charge. The jury were instructed that the damages recoverable were compensatory only, and that no exemplary or punitory damages were claimed or recoverable in the suit.

Although there is no fixed measure in dollars, applicable in such a suit, since the damages must vary according to the circumstances of each case, yet the damages awarded ought to be reasonably proportionate to the injury done; and hence a verdict is open to inspection and revision by the court, for the purpose of determining whether the jury were guided by a sound discretion in fixing damages.

The jury were charged that under the pleadings and evidence the plaintiff was entitled to recover actual damages for such injury to her feelings and reputation as was shown by the evidence. This language, while criticised by counsel, is not made the basis of any assignment of error. In the connection in which it was used, it was not erroneous. A reviewing court should not set aside a verdict on the ground of excessive damages, unless it is satisfied that it is the result of gross error, passion, bias, corruption or prejudice. 25 Cyc. p. 557, and cases cited.

Where the words of an alleged libel are actionable *per se*, the jury may be allowed to bring in general damages, though no special damages have been alleged or proved. *Simons* v. *Burnham*, 102 Mich. 189 (60 N. W. 476).

To the point that the defendant is liable for all actual damages sustained, including injury to the feelings and reputation of the person libeled, and as bearing on this element of damages, the recklessness, carelessness, or negligence of its employés in respect to the publication may be considered by the jury. See *Long* v. *Printing Co.*, 107 Mich. 207 (65 N. W. 108).

Without proof of injury from the words, the plaintiff was entitled to recover the actual damages to her reputation and feelings which the law presumes will flow from the commission of the act. And good faith in the publication of a libelous charge in no way affects the defend-

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ant's liability to compensate the plaintiff for her actual damages to reputation or feelings. *Schattler* v. *Daily Herald Co.*, 162 Mich. 115 (127 N. W. 42).

In this case the plaintiff, a young woman of good character, without justification, was paraded in a sensationally composed newspaper article as a "murderess," her chastity at least called in question, and illicit love attributed as the motive for her crime. We cannot say that the damages were excessive.

We find no reversible error in the record, and the judgment of the circuit court is affirmed.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

In re RADFORD.

1. CERTIORARI — APPEAL AND ERROR — QUESTIONS REVIEWABLE — DISBARMENT PROCEEDINGS.

   The writ of certiorari to review proceedings for the disbarment of an attorney at law (3 Comp. Laws, § 10497), brings before the Supreme Court for review only questions of law, not of fact; and the court will examine the evidence only to determine whether it justifies the finding of the court as a legitimate inference therefrom.

2. ATTORNEY AND CLIENT — DISBARMENT OF ATTORNEY — DEMURRER — PETITION.

   General and special demurrers to a petition for disbarment that charged respondent with refusing to account to the probate court as executor, with disobedience to specified orders of the court, with converting property of the estate to his own use, and other misconduct, were not sustainable on the

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theory that such petition was not sufficiently clear and specific, and was properly overruled.

3. SAME.

Formal allegations charging specifically acts of malpractice, etc., are not essential to the sufficiency of the petition, and if fair notice is given to the respondent of the nature of the charges and a reasonable opportunity for defense afforded, the proceedings are not open to objection.

4. SAME—PRACTICE—TAKING TESTIMONY.

Testimony taken at the hearing before the circuit court was not required to be read over to and signed by the respective witnesses.

5. SAME—EVIDENCE—UNPROFESSIONAL CONDUCT—ESTATES OF DECEDENTS—EXECUTORS AND ADMINISTRATORS.

Evidence showing that an attorney at law, appointed as executor of an estate, failed to file an inventory and account, disobeyed numerous orders of the probate court without excuse, retained funds of the estate in his hands for upwards of eight years, invested money of the estate in his own name in real property which he mortgaged and lost upon foreclosure proceedings, and was guilty of deceit towards the persons interested in the estate, sufficiently supports a finding that the attorney was guilty of unprofessional and immoral conduct requiring his disbarment.

6. SAME—CONDITIONS PRECEDENT.

Nor was it necessary that he be first convicted of criminal misconduct.

7. SAME—FIDUCIARY RELATION.

When an attorney has forfeited his claim to the office by such misconduct, professional or nonprofessional, in or out of court, as to render him unworthy, unfit, or unsafe to be entrusted with the duties and responsibilities of his profession, the court is justified in removing him from the bar.

Certiorari to Wayne; Rohnert, Mandell, and Murfin, JJ. Submitted January 31, 1912. (Docket No. 23.) Decided February 10, 1912.

Petition by Charles T. Wilkins and Charles W. Casgrain, *amici curiæ*, for the disbarment of George W. Radford. A judgment of disbarment is reviewed by respondent on writ of certiorari. Affirmed.

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Thomas A. E. Weadock, for appellant.

C. A. Kent and *William G. Fitzpatrick*, *amici curiæ*.

STONE, J. This is a proceeding for the disbarment of George W. Radford, who for many years has been a member of the bar in the courts of this State. The proceeding was taken at the instance and on the recommendation of the Detroit Bar Association, and has been conducted under the direction of the circuit court for the county of Wayne. That court appointed two members of the bar, as friends of the court, to make, prefer, present, and prosecute charges against Mr. Radford, hereinafter called the respondent.

The petition of the friends of the court is very lengthy, and, together with the exhibits attached thereto, covers more than 100 pages of the printed record. Its great length renders it inexpedient that it be set forth in full here. It is very explicit and full in its charges and specifications, and was duly verified upon information and belief. We have set forth the specifications which we deem material, as follows:

"(A) He wilfully and knowingly and unlawfully failed and neglected to file in the probate court for the county of Wayne, within the time required by law and by the conditions of his bond as such executor, and by an order duly and lawfully made by said probate court, any account, or inventory, so called, of the estate, real or personal, belonging to the estate of the said John E. Oxnard, deceased, which, of great value, had within that time come into his (said George W. Radford's) possession as such executor; and he wilfully and knowingly and unlawfully so continued in his said failure and neglect for eight years after he had been appointed and qualified as such executor, as is hereinabove, in paragraph numbered third hereof, also set forth.

"(B) He wilfully and knowingly and unlawfully failed and neglected to render to said probate court, within the time required by law and by the conditions of his bond as such executor, and by an order duly and lawfully made

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by said probate court, any account of his administration of the estate of the said John E. Oxnard, deceased, although during that time he had, as such executor, come into the possession of large amounts of property, both real and personal, belonging to said estate, and had made large disbursements thereof, and he wilfully, knowingly, and unlawfully so continued in his said failure and neglect for eight years after he had been appointed and had qualified as such executor, as is hereinabove, in paragraph numbered third hereof, also set forth.

"(C) He wilfully and knowingly and unlawfully and contemptuously, and without any good or lawful excuse, violated and disobeyed the lawful orders of the probate court of the county of Wayne, duly made and entered by and in said probate court the 10th day of March, A. D. 1908, and the 26th day of May, A. D. 1908, hereinabove referred to, and of which orders he had due notice, ordering and requiring him, within the times in such orders stated, to file in said court an account, or inventory, of said estate, and to render to said probate court his account as such executor, and an account of his receipts and disbursements as such executor, although, when such orders were made, he had, as such executor, come into possession and was then in possession of large amounts of property, both real and personal, belonging to said estate, and had made large disbursements therefrom; and, although a warrant was, on the 22d day of July, A. D. 1908, issued by and out of said probate court for his arrest and imprisonment for failure to obey, perform, and comply with the said order of the 26th day of May, A. D. 1908, he knowingly and wilfully and unlawfully and contemptuously, and without any good or lawful excuse, filed no inventory or account of such estate, and rendered no account of his receipts or disbursements as such executor until the 2d day of September, A. D. 1908, and after he had been removed from his office as such executor, as is hereinabove, in paragraph numbered third hereof, also set forth, and he, by his said actions, was and is guilty of wilful contempt of said probate court."

"(E) He has wilfully and knowingly and unlawfully and contemptuously disobeyed and violated a lawful order of the probate court of the county of Wayne, duly and legally made and entered by and in said probate court the 15th day of May, A. D. 1909, and hereinabove referred to, and another lawful order of said probate court, duly made and entered by and in said probate court the 14th day of

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July, A. D. 1909, and also hereinabove referred to, and from neither of which orders has any appeal been taken, or claimed, or noticed, and has wilfully and knowingly and unlawfully failed, neglected, and refused, and so continues to so neglect and refuse, to pay to Elizabeth R. Oxnard, and to the Security Trust Company, of Detroit, Mich., and to the county treasurer of Wayne county, the persons in such orders named, or to any of such persons, or to any one on behalf of such persons, or on behalf of any of them, the sums of money, or any part of the sums of money, by said probate court, and in and by such orders, then found due to such persons, respectively, from said George W. Radford as such executor, as aforesaid, and which said George W. Radford was by said probate court, and in and by such orders, then and there ordered to pay to such persons; and he (the said George W. Radford) has wilfully and knowingly and unlawfully neglected and refused, and so continues to so neglect and refuse, to turn over to said Emmet A. Perry, administrator *de bonis non* with the will annexed of said estate, and in such order of the 15th day of May, A. D. 1909, mentioned, the uncollected assets stated in said George W. Radford's said account, in Exhibit C thereof, or any part thereof, which uncollected assets the said George W. Radford was by said probate court, and in and by said last-mentioned order, ordered to so turn over to said Emmet A. Perry, as is hereinabove, in paragraph numbered fourth hereof, also set forth."

"(J) He wilfully and knowingly and unlawfully, in and by his testimony given in said probate court on the examination of his said account as such executor as aforesaid, sought to deceive and mislead said probate court, and to deceive and mislead and cheat and defraud the persons interested in said estate, and in the insurance moneys, so called, hereinabove mentioned, by knowingly and intentionally charging to the said estate and claiming credits to himself, as such executor and trustee aforesaid, for certain practically worthless investments which he claimed to have made from and out of the funds of said estate and from and out of said insurance moneys, and for and on behalf of said estate and for and on behalf of the persons interested in said insurance moneys, so called, which said investments, as he (the said George W. Radford) then and there well knew, he did not lawfully make from or out of said funds or said insurance moneys, and

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did not make for or on behalf of said estate, or for or on behalf of the persons interested in said insurance moneys, and for which investments he was entitled to no credit as such executor or trustee, all as he (the said George W. Radford) then and there, when he gave his testimony aforesaid, well knew, as is hereinabove, in paragraph numbered eleventh hereof, also set forth.

"(K) If he, as such executor and trustee of and under the said last will and testament of John E. Oxnard, deceased, made from and out of the funds of said estate, or from and out of the said insurance moneys, so called, and for and on behalf of said estate, or for and on behalf of the persons interested in said insurance moneys, so called, any of the investments hereinabove, in paragraph numbered eleventh hereof, mentioned, and which he claimed in his said testimony given in said probate court, on the examination of said account as such executor, that he did so make, as is hereinabove, in paragraph numbered eleventh hereof, set forth, then he (the said George W. Radford) wilfully and knowingly and fraudulently and unlawfully sought to deceive and mislead said probate court, and to deceive and mislead and cheat and defraud the said estate of John E. Oxnard, deceased, and the persons interested therein, and the persons interested in said insurance moneys, so called, when he failed and neglected to state in his said account as such executor the investments so made, and when he failed and neglected to credit said estate in such account, or otherwise, with said investments and with the moneys that he received on account thereof, and when he failed and neglected to credit the persons interested in said insurance moneys with such investments and with the moneys received on account thereof, as hereinabove, in paragraph numbered eleventh hereof, set forth.

"(L) He has wilfully and knowingly and unlawfully and fraudulently, and with intent to defraud the said estate and to cheat and defraud the persons interested in the funds and assets thereof, misappropriated and converted and applied to his own use a large sum of money, to wit, the sum of twenty-one thousand six hundred and eleven dollars and thirty-four cents ($21,611.34), which was received by him, and which came into the hands and possession and control of him (the said George W. Radford), as the executor of the last will and testament of the said John E. Oxnard, deceased, and which was a part of

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the funds and assets of said estate, as is also hereinabove set forth.

"(M) He, as such executor, knowingly received large sums of money belonging to the funds and assets of said estate for which he wilfully and knowingly and fraudulently neglected and refused to render any account, as by the said probate court he was ordered and required to do.

"(N) He knowingly and wilfully and fraudulently omitted from his said inventory of said estate, so filed in said probate court, as aforesaid, property which came into his possession as such executor.

"(O) He knowingly and wilfully and fraudulently charged and stated in his account as such executor as disbursements large sums of money, which, as he well knew, he did not lawfully disburse as such executor.

"(P) He was by the Honorable Edgar O. Durfee, judge of probate of the county of Wayne, lawfully appointed executor of and under the last will and testament of John E. Oxnard, deceased, as aforesaid, and as such executor collected goods, chattels, money, and effects of the said deceased, of great value, as above set forth, and still has such goods, chattels, money, and effects in his hands, possession, and control, and he wilfully and knowingly appropriated the same to his own use, and he has been, to wit, by an order entered by and in said probate court for the county of Wayne on the 15th day of May, A. D. 1909, and hereinbefore referred to, and a copy of which is hereto attached and marked 'Exhibit I,' ordered by the said judge of probate forthwith to deliver to his successor in trust and to the persons lawfully entitled thereto, and in such order mentioned, all the goods, chattels, money, and effects of the deceased in his (the said George W. Radford's) hands, and he (the said George W. Radford) has wilfully omitted, neglected, and refused for 60 days to obey said order, and, although 60 days have elapsed since said order was made, he still neglects and refuses to deliver said goods, chattels, money, and effects of the said deceased as he was and is in and by said order commanded, and he (the said George W. Radford) has thereby, and by his said neglect and refusal, committed the crime of embezzlement."

On the filing of this petition, an order to show cause, directed to the respondent, was duly signed and entered. Thereafter, on the 9th day of September, 1909 copies of

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the petition, charges, and specifications, and the order to show cause entered thereon, were duly served upon the respondent personally; and on September 14, 1909, the respondent, through his attorney, filed herein and served upon the friends of the court general and special demurrers to the petition. We shall have occasion to refer to these demurrers; but, as the same points there involved are discussed by respondent's counsel upon the final hearing, we do not deem it necessary to insert the demurrers here at length.

On September 25, 1909, the court overruled the demurrers, and ordered the respondent to file and serve his answer within 10 days. Thereafter respondent applied to this court for a writ of certiorari to review the order overruling his demurrers to the petition, which application was denied by this court. *In re Radford*, 159 Mich. 91 (123 N. W. 546). Afterwards, and on December 23, 1909, the respondent's answer was filed and served. This answer denies the material allegations of deceit, fraud, and malpractice charged in the petition.

On March 14, 1910, the taking of testimony on the issue joined on the petition and answer was begun before one of the circuit judges. At the conclusion of the testimony offered by the petitioners, the respondent moved to dismiss the proceedings for numerous reasons, among others, that the evidence did not support the allegations of the petition, and the respondent at first declined to offer any testimony. Later the respondent offered testimony which was received, the taking of which occupied many days, beginning June 16, and ending June 27, 1910. The case was argued and submitted before three of the circuit judges, and time was given to file briefs. On July 21, 1910, after filing an opinion, certain findings were entered in the journal of the court, and a formal judgment of disbarment was entered. These findings and judgment were as follows:

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"STATE OF MICHIGAN,

"In the Circuit Court for the County of Wayne.

"At a session of said court continued and held at the courthouse in the city of Detroit on the 21st day of July, A. D. 1910.

"Present: Hon. Morse Rohnert, Hon. Henry A. Mandell, and Hon. James O. Murfin, Circuit Judges.

"In the Matter of George W. Radford, an Attorney at Law.

"(Misc. No. 211.)

"This matter coming on to be heard in open court on the testimony in support of the petition herein offered by the friends of the court and the testimony offered by the respondent and the testimony of the friends of the court in rebuttal, and the matter having been duly argued by counsel for the respective parties, and the court being fully advised in the premises and after due consideration having been given to the matter, and it appearing to the court from the evidence taken herein that George W. Radford, an attorney at law, has been guilty of the charges of unprofessional conduct made against him, and it appearing from the evidence, the court now here finds that the said Radford wilfully, knowingly, and unlawfully failed and neglected to file in the probate court for the county of Wayne within the time required by law and the conditions of his bond as executor of the will of John E. Oxnard, deceased, and by orders duly and lawfully made by the said probate court, any account or inventory of the estate, real or personal, belonging to the said Oxnard, which had come into his (said George W. Radford's) possession as executor, and that he (said Radford) wilfully, knowingly, and unlawfully continued in such failure and neglect for eight years after he had been appointed and qualified as such executor; that said George W. Radford wilfully, knowingly, and unlawfully failed and neglected ro render to said probate court, within the time required by law and by the condition of his bond as such executor, and by the lawful orders of said probate court, any account of his administration of the estate of John E. Oxnard, deceased, and that during the time of such failure and neglect there had come into the possession of said George W. Radford large amounts of property, both real and personal, belonging to said estate; that said Radford had made large disbursements from the

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funds of said estate, and that said George W. Radford wilfully, knowingly, perversely, and unlawfully continued in his said failure and neglect to render accounts of his administration for the period of eight years after he had been appointed and had qualified as such executor; that he has wilfully, knowingly, and contemptuously, without any good or lawful excuse, violated and disobeyed the lawful orders of the probate court for the county of Wayne, requiring him (said George W. Radford) to file in the said probate court accounts of his administration of and an inventory of the assets and property of the estate of John E. Oxnard, deceased, and the said George W. Radford has knowingly, wilfully, and perversely disobeyed and violated the said lawful order of the probate court for the county of Wayne, made and entered in said court on the 17th day of November, 1908, requiring that he (said Radford) file his bond as trustee under the last will and testament of the said John E. Oxnard, deceased, and that at the time of such failure to file such bond he (said Radford) was in possession of large amounts of property which he was holding as trustee under said will; that the said Radford knew and had personal knowledge of the requirements of the provisions of said order requiring him to file a bond as such trustee, and that he wilfully, knowingly, and perversely continued and still continues to retain possession of said trust property under said will; that said George W. Radford wilfully, knowingly, and unlawfully disobeyed the lawful order of the probate court for the county of Wayne, duly and legally entered by and in said probate court on the 15th day of May, 1909, and another lawful order of said probate court on the 14th day of July, 1909, requiring the said Radford to turn over forthwith and pay over to one Elizabeth R. Oxnard the sum of $5,537.16, being the balance due from said George W. Radford on the said 15th day of May, 1909, to said Elizabeth R. Oxnard, as executor of the will of John E. Oxnard, deceased, and to forthwith turn over to the Security Trust Company, of Detroit, Mich., successor or trustee of the estate of John E. Oxnard, deceased, the sum of $15,904.19, with interest thereon from said 15th day of May, 1909, as required by said order of the probate court of July 14, 1909, and that said failure to pay said sums of money, respectively, still continues, and that said George W. Radford has not to the date hereof paid the same to the said several parties, nor has

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he paid any part thereof; that said orders of the probate court were not appealed from, and that no good and sufficient reason has been given by said Radford why said sums of money have not heretofore been paid to their rightful and lawful owners; that the said George W. Radford has wilfully, fraudulently, and unlawfully, and with intent to defraud the estate of the said John E. Oxnard, deceased, and to cheat and defraud the persons interested in the funds and assets thereof, misappropriated and converted and applied to his own use, to wit, said George W. Radford's use, large sums of money, to wit, $20,000 and upwards, which was received by him and which came into his possession and control as the executor of the last will and testament of the said estate of John E. Oxnard, deceased; that he (the said George W. Radford) did wilfully, knowingly, and contemptuously, in and by his sworn testimony given in the said probate court for the county of Wayne on the occasion of the examination of his said account as executor of the will of said John E. Oxnard, deceased, seek to deceive and mislead and cheat and defraud the persons interested in said estate and in certain moneys then and theretofore in the hands of said Radford, known and called 'insurance moneys,' which were and are the proceeds of certain insurance policies on the life of said John E. Oxnard, deceased, by knowingly, intentionally, falsely, and fraudulently charging to the estate of said John E. Oxnard, deceased, and to the insurance moneys, so called, and claiming credit to himself as such executor and as trustee, certain practically worthless investments, to wit, investments in real estate in the city of Detroit, known as 171 Fort Street West, and certain other real estate situate on the northwest corner of Clairmont and Woodward avenues in the said city of Detroit, and divers and sundry other investments, all of which said alleged investments were in the name of said George W. Radford, individually, and which said alleged investments he claimed to have made from and out of the funds of the estate of John E. Oxnard, deceased, and from and out of said insurance moneys, and for and on behalf of said estate, and for and on behalf of the persons interested in said insurance moneys and all of which said investments, as he (the said George W. Radford) then and there well knew, he did not make and from and out of said funds or said insurance moneys, and did not make

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for and on behalf of said estate, or for and on behalf of the persons interested in said insurance moneys, and for which investments he was entitled to no credit as executor and trustee, as he (the said George W. Radford) then and there, when he gave his testimony, as aforesaid, well knew; the said George W. Radford, as an attorney at law, and as an individual, in connection with his dealings with the estates of Frances E. and Alfred Chesebrough and with one George L. Chesebrough, the administrator of said estate, has been guilty of unlawful, immoral, and unprofessional conduct, in that, after having caused the legal title of the real estate in the city of Detroit, known as No. 171 Fort Street West, to be taken in his name, for the benefit and advantage and as trustee of the said George L. Chesebrough and others, such title being taken with the knowledge and consent of the said George L. Chesebrough, he (said George W. Radford) did thereafter assert and claim absolute ownership in himself of said real estate, and did deny, dispute, and repudiate the interest and estate of George L. Chesebrough in and to said real estate and the right of the said George L. Chesebrough to an account, and in that he (the said George W. Radford), although in possession of certain moneys belonging to the estate of said Frances E. Chesebrough and said Alfred Chesebrough, which he (said Radford) claimed to have disbursed from time to time, and although he (said Radford) came into possession and received large sums of money as the proceeds of a certain mortgage executed by said Radford in his name on said real estate last above mentioned, and of large sums of money as the rents of said real estate No. 171 Fort Street West, Detroit, and certain other large sums of money as the proceeds of the sale of two certain lots or parcels of real estate at one time belonging to the estate of Frances E. Chesebrough, and located on Kirby avenue in the said city of Detroit, he (said George W. Radford) wilfully, perversely, unlawfully, fraudulently, and deceitfully omitted, neglected, and refused to render to the said George L. Chesebrough an accounting or an account of said trust, and the said George W. Radford was repeatedly requested to furnish said accounting, or account by the said George L. Chesebrough and his agents and representatives; that in other respects and particulars, as well as for the reasons stated in the findings aforesaid, said George W. Radford has been and is guilty of immoralities which utterly unfit him

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for the faithful discharge of the duties of an attorney to his client and of the court in which he may practice, and the court doth hereby find that the character of the said George W. Radford is such as shall no longer be approved by this court, or any other court, and is such that we or the public cannot safely rely upon his (said George W. Radford's) honor and integrity.

"Due consideration having been given to the aforesaid findings, it is ordered, and the court doth hereby order, that the license of said George W. Radford to practice as an attorney and counselor at law and solicitor in chancery in all the courts of this State be, and the same is hereby, revoked and canceled, and that the name of said George W. Radford be, and the same is hereby, stricken from the roll of attorneys of this court, and that the said George W. Radford be, and is hereby, removed from his office and offices as an attorney and counselor at law and solicitor in chancery, and that the said George W. Radford be and he is hereby, forever disbarred from practicing as an attorney and counselor at law and solicitor in chancery in any of the courts of this State."

The respondent then applied to this court for a writ of certiorari to review the proceedings and judgment, which writ was granted.

In his petition for such writ, respondent alleges errors as follows:

"(*a*) In overruling your petitioner's said demurrer, and separately erred in overruling each and every ground thereof.

"(*b*) In not requiring each witness to examine his or her testimony, and to correct and sign the same, and in considering such testimony as evidence in this cause, without the same being done.

"(*c*) In refusing or failing to rule on your petitioner's motion, made at the close of the proofs of the friends of the court, to dismiss said proceedings, and in not granting said motion, and in not dismissing said proceedings.

"(*d*) In its conclusions and findings of fact, and as to each of the same, as set forth in its opinion (Exhibit C), and in its order (Exhibit D), and that the same are contrary to the evidence in said cause.

"(*e*) In finding that the acts mentioned in said order (Exhibit D) were done by your petitioner 'wilfully, un-

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lawfully, knowingly, perversely, contemptuously, falsely, fraudulently and intentionally,' as charged in the petition for disbarment in this cause; there being no testimony to support the same; and there being affirmative testimony showing that said acts were not so done.

"(*f*) In holding that the findings support the order of disbarment.

"(*g*) In entering an order of disbarment upon said findings.

"(*h*) In disbarring your petitioner.

"(*i*) In refusing to stay said order, pending a review by this honorable court."

It is well that we keep in mind the fact that this case is before us upon certiorari, under the provisions of section 10497, 3 Comp. Laws; and that it has been often held that the office of a certiorari is not to review questions of fact, but questions of law. And that in examining into the evidence the appellate court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would, or would not, have been drawn by the appellate tribunal. *Jackson* v. *People*, 9 Mich. 111 (77 Am. Dec. 491).

1. It is claimed that the court erred in overruling the demurrer, and in overruling each and every ground thereof. After an examination of the demurrer, both general and special, we are of opinion that it was properly overruled. The charges and specifications were explicit and clear, and the practice followed has been approved by this court. *In re Shepard*, 109 Mich. 631 (67 N. W. 971).

Randall v. *Brigham*, 7 Wall. (U. S.) 523, was a case which reached the Supreme Court of the United States on error to the United States circuit court for the district of Massachusetts. The action was brought by plaintiff, who was an attorney and counselor at law in Massachusetts, against the defendant, who was one of the justices of the

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superior court of that State, for an alleged wrongful removal by him of the plaintiff from the bar. Objection was raised to the sufficiency of the charges brought against the plaintiff. The statute of that State gave the superior court, it being a court of general jurisdiction, power to remove any attorney "for deceit, malpractice or other gross misconduct." It was there held that formal allegations, making specific charges of malpractice or unprofessional conduct, are not essential as a foundation for proceedings against attorneys.

"All that is requisite to their validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation."

A reference to our statute (sections 1128 to 1130) will show that its provisions were complied with in this proceeding. If the petition was true, it set forth sufficient grounds for the disbarment of respondent.

2. It is urged that the court erred in not requiring each witness to examine his or her testimony, and to correct and sign the same, and in considering such testimony as evidence, without the same being done. We think that there is no merit in this point. The testimony was taken in open court before one of the circuit judges. It would have been perfectly regular and competent for this judge to have alone heard and disposed of the case. He saw fit to call in two other judges to hear and decide the case, all acting together. We know of no rule requiring testimony so taken to be examined and signed by the witness.

3. The remaining allegations of error go to the merits of the whole case, and may well be examined together. They were well expressed by respondent's counsel in the oral argument, when he said that two questions were presented: *First.* Was there a fair trial? *Second.* Was there evidence to support the findings?

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After reading this record with great care, we are constrained to hold that both of these questions should be answered in the affirmative. By the uncontradicted evidence in the case, the manner in which the respondent handled the Oxnard estate, not only cannot be justified, but shows such a disregard of his legal obligations and duties as executor under the will of John E. Oxnard, deceased, to the legatees and to the court as calls for censure and condemnation. It is true that he was given by the will large powers of sale and investment, but the testator added, "in such manner as he may deem best to *preserve* my estate for the purposes herein named."

Mr. Oxnard died in November, 1899. The will was admitted to probate January 4, 1900, and the respondent qualified as executor. The total amount of the estate, including the life insurance, which came into the respondent's hands, was claimed to be over $30,000. Payments were made by respondent, as executor, to the widow and daughters, and to the surviving daughter from early in 1900 to July, 1908. During this time, no inventory of the estate and no executor's account had ever been filed in the probate court, although the legatees had on numerous occasions requested the respondent to close the estate.

On March 10, 1908, the probate court ordered the respondent to file an inventory and his final account within 30 days after service of a copy of the order. On the 26th of May, 1908, a further order was entered that the inventory and account be filed on or before June 26, 1908. These orders were disobeyed. On August 6, 1908, a petition was filed in said court by Florence O. Beach, the surviving daughter, reciting the issue and service of the orders of March 10th and May 26th, and averring the disobedience of respondent, and on July 22d an order for his arrest and imprisonment was made. The petition asked that respondent be removed as executor and trustee, and that a suitable person be appointed in his place. The warrant was issued July 22d. On August 25, 1908, the sheriff returned that he could not find respondent, and on

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the same day an order was made by the probate court, removing respondent from his executorship, and on September 13th Emmet A. Perry was appointed in his place. September 2d respondent filed his inventory and account. Objections were duly filed by the widow and daughter to the account. Later respondent filed an amendment of the account. On November 17, 1908, respondent was ordered to give a bond in the sum of $20,000, as trustee, and proof of the service of the order was filed November 23d. He did not comply with the order. The hearing on the account was adjourned from time to time, but on May 15, 1909, the probate court made an order and adjudication that:

"The cash balance due from said executor at this date, including interest, is the sum of $21,611.34, of which the sum of $5,537.16 is due Elizabeth R. Oxnard, and said executor is hereby ordered to pay over said sum to her forthwith. The court finds that the cash balance due the fund provided in said will for the benefit of said Florence Oxnard Beach is the sum of $15,904.19, to be hereafter assigned to the trustee to be appointed by this court."

The Security Trust Company of Detroit was appointed such trustee, and on July 14, 1909, the probate court ordered that:

"The cash balance due the fund provided in the will of said John E. Oxnard for the benefit of Florence Oxnard Beach, being the sum of $15,904.19, with interest thereon from said May 15, 1909, be and the same is hereby assigned to said Security Trust Company, trustee. And it is further ordered that George W. Radford forthwith turn over the said cash balance of $15,904.19 and the interest thereon to said trustee."

From this record, it appears that respondent has not paid over any of said sums. He has not appealed from said orders, or either of them. He claimed in the court below that the amounts decreed against him were too large; but in his answer he admitted an indebtedness of over $5,000. He made investments in his own name, in both personal and real estate, showing no connection with

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the trust. He kept the money belonging to the trust in his own bank account, and drew therefrom for his own uses, as well as for payments in the trust matters, without his checks or books showing any difference between the two. He kept no accounts, as executor, showing his investments. As to two pieces of real property in which he had invested the money of the estate, taking the title in his own name as absolute owner (both of which were mortgaged by him, and both of which were lost upon foreclosure of mortgage), he did not upon the trial produce or prepare any statement of receipts of rents and disbursements, although often asked so to do. His testimony upon those subjects was evasive, inconclusive, and very unsatisfactory. One cannot impartially read this record without reaching the conclusion that the respondent acted in bad faith in dealing with this estate; that he was guilty of deceit in his fiduciary relation to the legatees; and that the judgment of the circuit court was fully justified. The evidence shows, not a mere mistake in judgment, but a studied purpose and design to exploit the assets of this estate in his own interest, and not to preserve the estate for the purposes named in the will. The respondent is presumed to know the law, and his duty to those with whom he stands in a trust relation. We can reach but one conclusion, and that is that he acted in bad faith.

It is significant that in each of the cases in which the respondent is charged with improper and unprofessional conduct in the petition, he managed to get the legal title to the property of his *cestuis que trustent*, or clients, into his own name, as the absolute owner thereof. This opinion might well end here. But we shall notice some of the points urged by counsel for respondent.

It is claimed that the court has no right to disbar an attorney until, by a judicial proceeding, determined in a judicial way, the court shall find that by some criminal conduct on his part, of which he has been convicted, or for some professional misconduct, he has forfeited his right to practice law. The early case, *In the Matter of Mills*,

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1 Mich. 392, fully meets and answers this point. That case has been cited and followed many times.

The following authorities are in point here:

Sanborn v. *Kimball*, 64 Me. 140. This was a proceeding, in behalf of the bar of Penobscot county, for a removal of Kimball from the office of attorney and counselor at law. The court holds that an attorney at law is an officer of the court, and may be removed from office for misconduct, ascertained and determined by the court, after an opportunity to be heard has been afforded. The statute of Maine makes "a good moral character a condition precedent to admission to the bar." It was held that when an attorney at law had forfeited his claim to such character by such misconduct, professional or nonprofessional, in or out of court, as rendered him unworthy to society in general, and unfit and unsafe to be intrusted with the powers, duties, and responsibilities of the legal profession, the court may deprive him of the power and opportunity to do further injury, under the color of his profession, by removing him from the bar. The *Case of Mills*, *supra*, is cited with approval in that case.

In *Re Thatcher*, 80 Ohio St. 492 (89 N. E. 39), it was held that, in order to justify the court in disbarring an attorney, it was not necessary that his offense should constitute a contempt or a crime, or that he should be convicted of a crime or contempt before disbarment; that, while the power of disbarment should be exercised with great caution, yet, where the respondent had been found guilty of unprofessional conduct involving moral turpitude, and of misconduct affecting his character and standing as an attorney, and especially where he had manifested no signs of regret, and retracted nothing, the courts will not hesitate, through sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by striking such person from the roll of attorneys.

Ex parte Wall, 107 U. S 265 (2 Sup. Ct. 569). In this case it was held that an attorney's name will be struck off

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the roll, among other things, if he is guilty of gross misconduct in his profession, and of acts, although not done in his capacity as an attorney, gravely affecting his character as an attorney; but if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he has been convicted by a jury. And the court said:

"The cases are quite numerous in which attorneys, for malpractice or misconduct in their official character, and for other acts which showed them to be unfit persons to practice as attorneys, have been struck from the roll upon a summary proceeding, without any previous conviction of a criminal charge"— citing many cases, including *In the Matter of Mills*, 1 Mich. 392, and *In the Matter of George W. Wool*, 36 Mich. 299.

This case reviews many of the cases already cited at great length.

State v. *McClaugherty*, 33 W. Va. 250 (10 S. E. 407), holds that when an attorney commits an act, whether in the discharge of his duties as an attorney or not, showing such want of professional or personal honesty as to render him unworthy of public confidence, it is not only the province, but the duty, of the court, upon proper presentation of the case, to strike his name from the roll of attorneys.

In re Spencer, 137 App. Div. (N Y.) 330 (122 N. Y. Supp. 190). It is worthy of note that the statute in New York is similar to ours, in that it provides "an attorney and counselor who is guilty of any deceit, malpractice, crime or misdemeanor, may be suspended or removed from office." The case holds that the question for determination, both in appointing an attorney to, and removing him from, his office, is whether he is qualified to hold it. It is also held that his removal is not penal in character See *Bar Association of City of Boston* v. *Greenhood*, 168 Mass. 169 (46 N. E. 568). In this case the authorities are generally reviewed, and it is held that the primary purpose of the proceeding is not punishment, but the preservation of the virtue of the courts and protection to the public from attorneys who disregard their oaths of office; and

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attorneys may be removed for causes not included in the statute, such as ceasing to be of good moral character, within the meaning of these words as used in the statute prescribing requirements for admission to the bar.

In *Re Wilson*, 79 Kan. 674 (100 Pac. 635, 21 L. R. A. [N. S.] 517), it was held that whenever one who was in fact a lawyer accepted employment to act for some one else in a business transaction, in the course of which he received money belonging to his employer, his wrongful detention of it is a sufficient ground for his disbarment, although he may not have been called upon to give legal advice or to take part in litigation; that "such conduct would justify excluding him from the practice of the law, as it would certainly be a just cause of refusing an application for admission to the bar"—citing *In re Smith*, 73 Kan. 743 (85 Pac. 584). In this case the amount of money received and misappropriated was inconsiderable.

People v. *Salomon*, 184 Ill. 490 (56 N. E. 815). This was a proceeding to disbar respondent, Moses Salomon, for misconduct in his office as an attorney. In this case an attorney, acting for an administrator, who had collected money due the estate after the administrator had fled, and invested it in his own business, defying the orders of the probate court to turn the money over to an administrator appointed by it, was held guilty of such misconduct in office as authorized his disbarment. The court said:

"Such conduct on the part of an attorney at law must be regarded, within the statute, 'as malconduct in office,' and must be condemned as unworthy of the honorable profession to which he belongs. Sharswood, in his Essay on Professional Ethics, says:

"'There is no class of men among whom moral delinquency is more marked and disgraceful than among lawyers. Among merchants, so many honest men become involved through misfortune that the rogue may hope to take shelter in the crowd and be screened from observation. Not so the lawyer. If he continues to seek business, he must find his employment in lower and still lower grades, and will soon come to verify and illustrate the remark of Lord Boling-

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broke that, "the profession of the law, in its nature the noblest and most beneficial to mankind, is in its abuse and abasement the most sordid and pernicious."'"

People v. *Chamberlain*, 242 Ill. 260 (89 N. E. 994). This case holds that the power of the supreme court of Illinois to disbar an attorney is an inherent one, which exists independently of any statute on the subject; and, if satisfied that the attorney has acted fraudulently and in bad faith, the court may disbar him, regardless of whether or not the case comes technically within the provisions of the statute.

It is also held that the fact that a client had settled with his attorney for money collected did not preclude subsequent inquiry into the moral and professional character of the attorney's acts; and if it was shown that he had acted in bad faith toward such client, and had obtained, by misrepresentation and concealment of facts, money to which the client was rightfully entitled, the court might disbar the attorney, notwithstanding such settlement.

In *Randall* v. *Brigham*, *supra*, the court said:

"The authority of the court over its attorneys and counselors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands, and confided to their management. The confidence which they receive, and the responsibilities which they are obliged to assume, demand, not only ability of the highest order, but the strictest integrity. The authority which the courts hold over them, and the qualifications required for their admission, are intended to secure those qualities."

Many more cases might be cited, going much further than we find it necessary to go, to sustain the judgment of the court below.

We find no error in the proceedings, and the judgment of the circuit court is affirmed.

MOORE, C. J., and STEERE, BROOKE, and BLAIR, JJ., concurred.

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FOLEY *v.* GRAND RAPIDS & INDIANA RAILWAY CO.

1. ATTORNEY AND CLIENT — CONTRACT — COMPROMISE WITHOUT CONSENT OF ATTORNEY—COMPENSATION.

   Parol evidence was not admissible, in a personal injury action which the client compromised without the consent of his attorneys, and which was thereafter prosecuted by the attorneys for their fees, to show that a written instrument executed by plaintiff and defendant purporting to be a settlement of the entire cause of action, was actually a settlement of an undivided half of plaintiff's claim.

2. SAME—LIEN—CONTRACT.

   Under a contract giving the attorneys a lien on the moneys obtained by any settlement without depriving the client of the right to enter into a compromise against their consent, as soon as the amount of settlement was agreed upon, the attorneys became entitled to the percentage thereof fixed by the instrument.

3. SAME—TENDER—PAYMENT INTO COURT.

   Judgment was properly directed for defendant who had tendered and paid into court the correct sum due plaintiff's attorneys.

Error to Cheboygan; Shepherd, J. Submitted December 15, 1911. (Docket No. 109.) Decided February 10, 1912.

Case by James Foley against the Grand Rapids & Indiana Railway Company for personal injuries,—prosecuted for the benefit of plaintiff's attorneys after settlement, to satisfy their lien. Judgment for plaintiffs for less than the amount claimed, upon a verdict directed by the court. Plaintiffs bring error. Affirmed.

Benjamin & Quay (*De Vere Hall*, of counsel), for appellant.

James H. Campbell, for appellee.

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BLAIR, J. The writ of error in this case is prosecuted to review the judgment of the circuit court, entered upon a directed verdict upon the trial of the issue, framed in accordance with the opinion of this court in *Grand Rapids, etc., R. Co.* v. *Cheboygan Circuit Judge*, 161 Mich. 181 (126 N. W. 56, 137 Am. St. Rep. 495).

There are two questions requiring consideration, viz.: (1) Did the court err in holding that parol evidence was not admissible to show that the agreements, printed at pages 183, 184 of 161 Mich. (126 N. W. 57, 137 Am. St. Rep. 495), were in truth and in fact intended to be, and actually were, not a settlement of Foley's entire cause of action, but only of his undivided one-half interest therein? (2) That plaintiffs, under their lien, were entitled to the same amount which Foley received.

1. The offered testimony was not limited to showing the consideration of the contract merely, but sought to change the scope and effect of the contract, and to cast upon the defendant an obligation which the contract did not require of it. The court properly rejected such testimony. *Kibler* v. *Caplis*, 140 Mich. 28 (103 N. W. 531, 112 Am. St. Rep. 388); *Tradesman Co.* v. *Manufacturing Co.*, 147 Mich. 702 (111 N. W. 343, 112 N. W. 708); *Stockbridge Elevator Co.* v. *Booth*, 165 Mich. 212 (130 N. W. 619); *International Text-Book Co.* v. *Marvin*, 166 Mich. 660 (132 N. W. 437); *Sheffler* v. *Sherman*, 167 Mich. 42 (132 N. W. 466); 17 Cyc. p. 661, subd. "i."

2. Under his agreement with his attorneys (see 161 Mich., at page 185 (126 N. W., at page 57, 137 Am. St. Rep. 495), Foley was entitled to make a settlement without the consent, and even against the opposition, of his attorneys. And, in the event of such settlement, "second parties shall have a lien on any * * * money that may be obtained from said railroad company." By the very terms of the agreement, therefore, the moment the amount of the settlement was agreed upon, the attorneys'

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lien attached thereto at the percentage fixed by their agreement with their client.

The defendant having paid into court one-half the amount of the settlement and costs then a proper charge, the court did not err in directing a verdict in its favor.

The judgment is affirmed.

STEERE, BROOKE, STONE, and OSTRANDER, JJ., concurred.

WEIMER *v.* KALAMAZOO CIRCUIT JUDGE.

INTOXICATING LIQUORS—MANDAMUS — CRIMINAL LAW — CARRYING ON BUSINESS WITHOUT A LICENSE.

Evidence that the respondent in a criminal action took out a retail liquor dealer's license to engage in business at a certain place, and while the building was undergoing repairs or alterations he entered the employ of another retail dealer as manager of the business which was conducted at a separate location, under a license issued to the owner, is insufficient to sustain a prosecution upon a charge of selling and keeping for sale intoxicating liquors, in violation of Act No. 291, Pub. Acts 1909.

Mandamus by George V. Weimer, prosecuting attorney of Kalamazoo county, against Frank E. Knappen, circuit judge of said county, to compel respondent to vacate an order quashing an information wherein William S. Forler was charged with selling and keeping for sale intoxicating liquors without having procured a license therefor. Submitted January 30, 1912. (Calendar No. 24,932.) Writ denied February 10, 1912.

George V. Weimer, in pro. per.

R. L. Campbell and *Harry C. Howard*, for respondent.

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BROOKE, J. Relator asks for a writ of mandamus requiring respondent to set aside and vacate an order quashing an information and discharging one William S. Forler, who was charged with engaging in the business of selling and keeping for sale spirituous, malt, brewed, and intoxicating liquors, contrary to the provisions of Act No. 291 of the Public Acts of 1909. After examination before a municipal justice, Forler was permitted by the circuit judge to withdraw his plea of "not guilty" for the purpose of making a motion to quash the information. This motion sets out six different reasons for the relief sought, only one of which was considered by the learned trial judge to be fatal to the case made by the people. That one reads as follows:

"The evidence taken upon the examination of respondent, on which the information filed herein is based, shows that no offense under the laws of the State of Michigan has been committed."

The learned circuit judge, in his answer to the order to show cause herein, says, in part:

"It appeared from the record that said William S. Forler, who was charged with conducting a retail liquor business without a license, in the city of Kalamazoo, during May, 1911, had during the year 1910 conducted a retail liquor business at No. 109 East Main street. It further appears that a license had been issued by the city council of the city of Kalamazoo to said William S. Forler to conduct a business for retail liquor selling at Nos. 226–226½ East Main street, Kalamazoo, Mich., and that all the legal requirements had been complied with by the said William S. Forler previous to the time when the complaint was made against said William S. Forler for conducting an illegal retail liquor business. It further appears that a retail liquor dealer's license was issued to Louis A. Kertson to conduct a retail liquor business at No. 236 East Main street, Kalamazoo, Mich., and it further appears that the complaint against William S. Forler was based upon his connection with the business of the saloon at No. 236 East Main street, Kalamazoo, Mich. All the legal requirements, such as making the application, filing a bond for approval, having it approved by the proper body

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and obtaining a license, were complied with by Louis A. Kertson as far as No. 236 East Main street was concerned. It further appears by the record that the license obtained by William S. Forler for Nos. 226–226½ East Main street was not used until after the time alleged in said complaint for the reason that Nos. 226–226½ East Main street was undergoing repairs; * * * that the said William S. Forler, who held a retail liquor dealer's license for Nos. 226–226½ East Main street, and who was unable to occupy that location on account of repairs being made therein, was hired on May 9, 1911, by Louis A. Kertson, to manage his (Kertson's) retail business at No. 236 East Main street until such time as Forler's place of business would be ready for occupancy. The record shows that from May 1, 1911, to May 9th or 10th, one William S. Dean was hired by Louis A. Kertson to manage that place. There is no evidence whatever that any one other than Louis A. Kertson individually had anything whatever to do with the hiring of any of these clerks or managers so called; * * * that after careful consideration of all the testimony of the people's witnesses taken upon the examination in the court below, respondent came to the conclusion that the only possible inference to be fairly drawn from all of the testimony was that William S. Forler was hired by Louis A. Kertson, who held a license at No. 236 East Main street, and who has complied with every legal requirement so that a retail liquor business could be conducted at that place, and that William S. Forler was at such place simply as manager, clerk, or hired man for Louis A. Kertson."

The other matters covered by the testimony and dealt with in the return need not here be considered. The sole question here presented is whether there was any testimony introduced on behalf of the people tending to establish the charge against Forler that he was engaged, during the time specified, in the liquor business contrary to the provisions of the statute.

We have examined this record with care, and are satisfied that a correct conclusion was reached by the court below.

The writ is denied.

MOORE, C. J., and STEERE, BLAIR, and STONE, JJ., concurred.

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INTERNATIONAL TEXT-BOOK CO. *v.* ROBERTS.

1. AMENDMENT — JUSTICES OF THE PEACE — APPEAL AND ERROR — NOTICE OF DEFENSE — AFFIDAVIT — DENIAL OF EXECUTION OF CONTRACT.

   The order of a circuit court, on appeal from justice's court, permitting the defense to file an affidavit denying the execution of a written contract, was within the court's discretion, on a showing by defendant that he first saw the alleged contract at the trial below.

2. CONTRACTS—PLEADING—TRIAL.

   When plaintiff made no claim of recovery on any other than the contract in writing declared upon, and defendant denied its execution, claiming to have made a different oral contract, which he contends plaintiff had broken, the court committed prejudicial error in admitting evidence of a breach of any other agreement than the written instrument.

3. SAME—PAROL EXTRINSIC EVIDENCE—WRITTEN CONTRACT.

   And the court erred in receiving evidence of parol promises or statements of plaintiff's soliciting agent having some tendency to vary and to contradict the writing.

4. SAME—TRIAL—DIRECTING VERDICT.

   Except as to the question of the execution of the written contract, which was a question of fact, the plaintiff was entitled to peremptory instructions in its favor for the amount of damages agreed upon and stipulated by the parties.

Error to Jackson; Parkinson, J. Submitted November 23, 1911. (Docket No. 177.) Decided February 10, 1912.

Assumpsit by the International Text-Book Company, a foreign corporation, against William A. Roberts for damages on a declaration specially alleging a contract in writing. Judgment for defendant. Plaintiff brings error. Reversed.

J. J. Calkins (*David C. Henderson*, of counsel), for appellant.

Frank L. Blackman, for appellee.

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STEERE, J. Plaintiff sued defendant in justice's court to recover $47.79, being a balance claimed to be due on a contract for a course of instruction in the International Correspondence School at Scranton, Pa., of which plaintiff is proprietor. Defendant was a car marker residing in Jackson, Mich., and at the solicitation of one of plaintiff's agents engaged for a course of instruction in said school, which was to cost him $68, less 20 per cent. discount. He entered upon his course of study, worked two lessons in arithmetic, "got down to example 14" in the third, "couldn't work it out," and quit. In the meantime he had made two payments of $5 each. He refused to pay the balance, claiming plaintiff had not given him assistance in his studies as agreed, whereupon this suit was brought. Issue was joined in justice's court May 24, 1909. Plaintiff declared orally on the common counts in assumpsit and specially on a written contract. Defendant pleaded the general issue, and gave notice that plaintiff had failed to fulfill in certain particulars its part of the contract. The case was tried in justice's court before a jury and a verdict rendered in defendant's favor. It was appealed to the circuit court, where defendant again secured a verdict. A motion for a new trial was denied, and the case is now brought before this court by plaintiff on writ of error.

There are many assignments of error, the subject-matter of some of them not appearing in the printed record. They include rulings of the court in permitting amendment of the pleadings, in passing on the admissibility of testimony, in refusing to give plaintiff's requests, the charge of the court as given, and its refusal to grant a new trial.

What took place at the trial of the case in justice's court, aside from the pleadings and verdict, is not disclosed, but, after appeal and return of the case by the justice to the circuit court, a motion was made in the latter court for leave to file an affidavit of the defendant denying execution of the written contract, which plaintiff had offered in evidence in the court below, the application

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being supported by affidavits of the defendant and his attorney to the effect that they first saw said contract at the time of the trial in justice's court. An order granting said motion was made by the circuit court September 13, 1909. This was duly excepted to, and is plaintiff's first assignment of error. The order of the circuit court allowing the affidavit to be filed was discretionary. *Polhemus* v. *Savings Bank*, 27 Mich. 44; *Freeman* v. *Ellison*, 37 Mich. 459; *Chicago, etc., R. Co.* v. *Edson*, 41 Mich. 673 (3 N. W. 176).

At the trial of the case in the circuit court plaintiff introduced in evidence a contract in writing for a course of study in its school purporting to be signed by defendant. The genuineness of defendant's signature and the circumstances connected with obtaining it were testified to by plaintiff's soliciting agent, named Clark, who had secured the contract. Plaintiff also introduced evidence as to its organization, the nature and methods of doing its business, its acceptance and observance of the contract sued upon, defendant's abandonment of the same, and refusal to pay the balance claimed to be due thereon. Defendant denied executing the contract offered in evidence, and testified that it did not bear his signature. He admitted that as a result of negotiations with plaintiff's soliciting agent, Clark, he signed some kind of a contract for a course of instruction in plaintiff's school, and commenced a course of study, using certain lessons furnished by plaintiff. His testimony as to what he signed is manifestly indefinite and evasive. He testifies:

"I signed something, I don't know what it was. * * * I was rather in a hurry, I guess."

Later in his testimony he says he understood he was making a contract with the company for a course of instruction; that he did not know all the provisions of the paper which he signed; but "I read part of them; yes, sir, with Mr. Clark. I could not tell you what part I read, though." He further testified in that connection, under

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objection, of promises made by Clark to furnish him a special instructor, and subsequent unsuccessful efforts on his part to obtain from Clark personal assistance in his studies.

As the case developed, the only issue of fact to be passed on by the jury was whether or not defendant executed the contract sued upon and offered in evidence. Counsel for plaintiff abandoned the common counts, and stated in open court—

"The whole claim is upon this contract, your honor. * * * He has got to defend on that contract or nothing. We say it is the contract or nothing."

Counsel for defendant stated in open court:

"They did make a contract with him, in which they stated part of the contract was he should have a special instructor here, or instructor here. * * * We admit he signed a contract or paper, entered into an agreement with them to take their correspondence or their instruction."

The contract offered in evidence is in the nature of a proposal or subscription from defendant which was subject to acceptance by plaintiff. The court instructed the jury that it was a question of fact for them to determine whether or not the contract, if signed by defendant, had been accepted by plaintiff, saying:

"If it was not accepted at Scranton, it never became binding on the defendant, and plaintiff cannot recover because, as I say, this was a proposition which defendant sent to be accepted at the home office in Scranton."

The undisputed evidence is that the contract, whatever it was, had been accepted by plaintiff and acted upon by both parties. The defendant himself testified that he was furnished the lessons provided for in the contract offered in evidence, and that with them he entered upon his course of study. If he signed the contract relied upon by plaintiff, it is undisputed that it was accepted. If he did not sign it, the plaintiff cannot recover, and defendant's claim of a breach of some other and different contract is immaterial. It was error to leave that issue to the jury. This

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was repeated in the following portions of the instructions which otherwise are correct:

"As to this claim that plaintiff was guilty of a breach of this contract in the first instance and so absolved him, defendant, from being further bound by it, is not supported by the proof in this case. I must instruct you that if defendant's signature is genuine and plaintiff accepted the subscription or proposition sent by defendant, and the parties entered upon its performance, that as in my judgment the evidence conclusively shows that defendant was guilty of the breach on his part in the first instance, and in such case your verdict must be for the plaintiff in the sum of $47.79, which the parties agree is a correct computation and proper sum."

"If you find defendant signed the contract and that it was accepted, then, as I instructed you, I do not think there is evidence in the case that plaintiff failed to carry out its own contract, but the evidence conclusively establishes that defendant was guilty of the breach, and plaintiff in such case should recover."

The measure of damages, which otherwise might have been a question for the jury under rules stated in former decisions on this class of contracts, appears to have been stipulated in this case as follows:

"Tuesday morning it was agreed in open court by counsel that the interest was $3.39, making total due on contract $47.79."

Testimony was given, under objection, by defendant as to statements and promises of the soliciting agent which were at variance with, or additions to, the contract relied upon. The admission of this testimony was error. *International Text-Book Co.* v. *Marvin*, 166 Mich. 660 (132 N. W. 437). The court subsequently sought to cure this error, and instructed the jury "that the testimony as to talks or promises by Clark to the defendant which would contradict or change the writing should be disregarded."

It is to be borne in mind that the genuineness of defendant's signature to the contract was the paramount and only proper issue for the jury. The evidence on that issue consisted of certain of defendant's admitted or claimed

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signatures, together with his testimony diametrically opposed to that of Clark, the soliciting agent; they two being the only witnesses having personal knowledge. All through the trial of the case this issue was permeated with and confused by imputing questions and accusing answers on matters entirely foreign to the real question, tending to impress the jury with the thought that defendant had been imposed upon and deceived by empty promises of Clark, and thus innocently inveigled by glowing misrepresentations to engage for a course of instruction in the belief that plaintiff would open for him a royal road to learning. In view of the verdict rendered, we think there is force in the claim that such testimony would have a tendency, which the charge of the court could not eliminate, to bias and prejudice the minds of the jury, and divert their attention from the real issue before them. The case should have been tried free from the possibility of such prejudicial influences. Contracts similar to the one under consideration have several times been reviewed by this and other appellate courts. The rights of parties under them are now quite clearly defined. *International Text-Book Co.* v. *Lewis*, 130 Mo. App. 158 (108 S. W. 1118); *International Text-Book Co.* v. *Peterson*, 218 U. S. 664 (31 Sup. Ct. 225); Id., 146 Wis. 119 (130 N. W. 1134); *International Text-Book Co.* v. *Schulte*, 151 Mich. 149 (114 N. W. 1031); *International Text-Book Co.* v. *Jones*, 166 Mich. 86 (131 N. W. 98); *International Text-Book Co.* v. *Marvin*, *supra*.

As the case presents itself on this record, aside from the question of the genuineness of defendant's signature to the contract, the court should have directed a verdict for plaintiff.

For the errors stated, this case is reversed, and a new trial granted.

MOORE, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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TITUS v. CHIPPEWA CIRCUIT JUDGE.

1. VENUE — EQUITY PRACTICE — PARTIES — JURISDICTION — COMMENCEMENT OF SUITS.
   One residing in the county of St. Clair may not file a bill of complaint in the circuit court for the county of Chippewa against a party defendant that is a resident of the Dominion of Canada to restrain the taking of depositions of certain witnesses in a criminal proceeding pending in the Canadian courts. 1 Comp. Laws, § 434.

2. SAME—LOCAL OR TRANSITORY ACTIONS.
   The subject-matter of such suit not being local, as required by the provisions of said law, the proceeding must be instituted in the county where plaintiff resided.

3. SAME—DEMURRER CLAUSE—ANSWER IN EQUITY—JURISDICTION.
   The question of jurisdiction was properly raised by a demurrer clause in defendant's answer, upon which the hearing could only take place at the time of final hearing.

4. MANDAMUS—INJUNCTION—APPEAL AND ERROR.
   Although the Supreme Court does not review by mandamus, in ordinary cases the issuance of a preliminary writ of injunction granted upon the hearing of an order to show cause, it will take cognizance of a case which involves merely a question of law.[1]

Mandamus by Fernando E. Titus against Horace M. Oren, judge of the Chippewa circuit court, to compel respondent to vacate an order granting an interlocutory injunction. Submitted January 9, 1912. (Calendar No. 24,877.) Writ granted February 10, 1912.

E. S. B. Sutton (*O. F Hunt* and *Burlingham, Montgomery & Beecher*, of counsel), for relator.

Sherman T. Handy, for respondent.

STONE, J. This is a petition for mandamus to compel the respondent to vacate and set aside his order dated

[1] Mandamus in exercise of superintending control over inferior courts, see note in 51 L. R. A. 33.

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November 4, 1911, ordering the issue of a writ of injunction, being the writ of injunction dated November 9, 1911, based on said order in the cause pending in the circuit court for the county of Chippewa, in chancery, wherein Alexander Cunning is complainant and the relator is defendant. The facts briefly stated are as follows:

A criminal cause styled "*The King* v. *Alexander Cunning*" is at issue and undetermined in the district court of Manitoulin, Province of Ontario, Dominion of Canada, wherein the said Cunning is charged with the crime of larceny. Thereafter said district court issued a commission authorizing and directing the relator to take depositions of certain witnesses in behalf of the king residing in the county of Chippewa and State of Michigan. Relator presented to the circuit court for the county of Chippewa his petition for an order for subpœnas to compel the attendance of witnesses, claiming to act in pursuance of the provisions of section 10138, 3 Comp. Laws. In pursuance of said petition, an order was made authorizing and directing the clerk of the circuit court to issue subpœnas for the witnesses named. Thereafter, and on October 29, 1911, said Alexander Cunning filed a bill of complaint in the circuit court for the county of Chippewa, in chancery, praying for an injunction restraining petitioner and relator as such commissioner from taking the depositions of said witnesses. Upon filing said bill, a restraining order was issued as prayed for, together with an order to show cause. Relator filed an answer to the order to show cause and also an answer to the bill of complaint. In his answer to the bill of complaint relator denied that the complainant was entitled to any relief whatever by reason of said bill, and he also prayed that the writ of injunction and order to show cause might be dismissed, set aside, and held for naught. The last paragraph of the answer to the bill is as follows:

"And this defendant, further answering, denies that said complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, and prays

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the same advantage of this answer as if he had pleaded or demurred to the said bill of complaint, and prays to be dismissed with his reasonable costs and charges in this by him in his behalf most wrongfully sustained, and that the injunction issued in this cause, and served upon this defendant, may be vacated, dismissed, and held for naught."

The order to show cause having been argued and submitted to the court, an order was issued November 4, 1911, granting a preliminary injunction, and on November 9, 1911, the preliminary injunction was issued, and served upon relator. We have examined the record fully, including the answer of the respondent. It appears by the said bill of complaint that the said Alexander Cunning is and was when the bill of complaint was filed, a resident of the city of Port Huron, in the county of St. Clair, State of Michigan, and, as appears by the exhibits attached to the bill of complaint, the relator. Fernando E. Titus, is, and was when the bill was filed, a resident of Gore Bay, in the district of Manitoulin, Canada.

Was the bill of complaint properly filed in the circuit court for the county of Chippewa, in chancery; and, if not, is that question properly before us? Our statute (section 434, 1 Comp. Laws), among other things, provides:

"Every suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject-matter is local, and, if it is not local, in the county where one of the parties in interest resides, if either is a resident of the State; but if the subject-matter is not local, and neither party resides in the State, the suit may be brought in any county."

An examination of the bill of complaint shows clearly that no property is in dispute in the case, and that the subject-matter of the bill is not local within the meaning of the statute It is equally clear that neither of the parties resides in the county of Chippewa, but that the complainant therein resides in another county of this State, and that the defendant therein resides in Canada. This being the situation, we are of opinion that the bill of com-

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plaint was improperly filed in the circuit court for the county of Chippewa, in chancery, and that that court was without jurisdiction to issue the injunction. *Chapin* v. *Montcalm Circuit Judge*, 104 Mich. 232 (62 N. W. 351); *Richard* v. *Boyd*, 124 Mich. 396 (83 N. W. 106); *Roberts* v. *Roberts*, 124 Mich. 414 (83 N. W. 132); *Lawrence* v. *Hathaway*, 128 Mich. 119–123 (87 N. W. 84); *Prather Engineering Co.* v. *Railway*, 152 Mich. 582 (116 N. W. 376); *Wipfler* v. *Warren*, 163 Mich. 189 (128 N. W. 178).

We think that the answer fully raised the jurisdictional question. Under our practice the hearing upon the demurrer clause in the answer could not take place until the final hearing of the cause. *Zabel* v. *Harshman*, 68 Mich. 270 (36 N. W. 71); *Smith* v. *Blake*, 96 Mich. 542 (55 N. W. 978); *Brassington* v. *Waldron*, 143 Mich. 364 (107 N. W. 100). We are constrained, therefore, to hold that the Chippewa circuit court, in chancery, had no jurisdiction of the cause, and hence no power or authority to order or issue the injunction complained of.

We need not discuss the question as to whether mandamus is the proper remedy here. We have said that, while ordinarily this court does not by mandamus review the action of a circuit judge in injunction cases, yet, where the return shows the question in dispute to be one of law merely, it will consider the case. *Ionia, etc., Ins. Co.* v. *Ionia Circuit Judge*, 100 Mich. 606 (59 N. W. 250, 32 L. R. A. 481); *Siegel* v. *Wayne Circuit Judge*, 155 Mich. 459 (119 N. W. 645), and cases there cited.

The writ will issue as indicated, but without costs.

STEERE, MCALVAY, BROOKE, and OSTRANDER, JJ., concurred with STONE, J.

BLAIR, J. I concur on the ground that the remedy by appeal would not afford an adequate remedy.

MOORE, C. J., concurred with BLAIR, J.

BIRD, J., did not sit.

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ATTORNEY GENERAL, *ex rel.* McRAE, *v.* THOMPSON.

DETROIT LIBRARY COMMISSION *v.* HEINEMAN.

1. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—HOME RULE ACT — DETROIT CHARTER — LIMITATION OF INDEBTEDNESS — SPECIAL ACT—LOCAL LEGISLATION.

   Act No. 802, Local Acts 1911, amending the existing charter of the city of Detroit by extending the limit of municipal indebtedness from two to three per cent. of the assessed valuation, is invalid: under the Constitution the charter may only be amended by general revision, and the statute, being a local act, is in excess of the legislative authority, since a general act could be made applicable. Const. art. 5, § 30.

2. SCHOOLS AND SCHOOL DISTRICTS—LIBRARIES—CITIES — DETROIT LIBRARY COMMISSION.

   Free public libraries are within the proper range of school apparatus and are supplemental to, and a part of, the educational system of the State.

3. SAME—SCHOOL BOARDS—MUNICIPAL CORPORATIONS.

   School boards are separate and distinct municipal corporations and State agencies.

4. SAME—EDUCATION—FINANCE.

   Education in Michigan is not a part of the local self-government inherent in the townships or municipalities except in so far as the legislature may choose to make it so.

5. SAME—CONSTITUTIONAL LAW—CITIES.

   It was the intent of the Constitution to separate the school organization from the general municipal government.

6. SAME.

   Though municipal corporations, organized for the same purposes, with like powers and duties, cannot exist in the same territory, those having different purposes, rights, and duties may, and often do, occupy the same territory.

7. SAME—STATUTORY CONSTRUCTION—CHARTERS.

   Construing the provisions of the Detroit charter limiting the municipal indebtedness, in connection with the evident purposes of the legislature, with the other provisions of the

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instrument and with reference to the title, which omits any reference to the educational system, the limitation applies only to the indebtedness for general municipal purposes.[1]

8. SAME.

The application of particular provisions is not to be extended beyond the general scope of a statute unless such extension is manifestly designed.

9. SAME.

Taxes and bonds for school and educational purposes are not for city and municipal purposes.

Appeal from Wayne; Hosmer, J. Submitted January 30, 1912. (Calendar No. 24,990.) Decided February 16, 1912.

Bill by Franz C. Kuhn, attorney general of the State of Michigan, on the relation of Milton A. McRae, against William B. Thompson, mayor of the city of Detroit, and others, to restrain the issuance of library, sewer, school, and waterworks bonds duly authorized. From a decree for complainant, defendants appeal. This cause was consolidated with the mandamus proceedings above mentioned in the Supreme Court and both were argued and submitted as one cause. Reversed.

Certiorari to Wayne; Hosmer, J. Submitted January 30, 1912. (Calendar No. 24,985.) Decided February 16, 1912.

Mandamus by the Detroit library commission, the board of education of the city of Detroit, and the board of health of said city, by separate petitions against David E. Heineman, city controller, to compel respondent to issue bonds duly authorized at a special election and by the common council. The proceedings were heard as one case by the circuit court by which the writ was denied. Reversed.

[1] What constitutes an "indebtedness" within meaning of constitutional and statutory restrictions of indebtedness of municipal corporations, see note in 23 L. R. A. 402.

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In chancery case: *Franz C. Kuhn*, Attorney General (*Fred A. Baker*, of counsel), for complainant.

Richard I. Lawson, for defendants.

In second case: *Divie E. Duffield*, for appellant Detroit library commission.

Edmund Atkinson, for appellant board of education.

Fred A. Baker, for appellant board of health.

Richard I. Lawson and *David E. Heineman*, for appellee.

STEERE, J. These proceedings have been equitably consolidated by common consent and, by permission of the court, argued and submitted together. They involve the validity of certain proposed bond issues of the city of Detroit. Said proposed issues, delayed by and directly involved in this contention, are: Sewer bonds, $730,000; school bonds, $656,000; library bonds, $216,000; waterworks bonds, $250,000. They were authorized by popular vote, action of the city council and board of estimates, and all proceedings leading up to their issue have been cared for by skilled counsel and appear regular. It is not necessary to review those details here, as no question is raised against their validity except the general limit on the city's indebtedness.

The case of *Attorney General, ex rel. McRae*, v. *Thompson*, was recently before this court (167 Mich. 507 [133 N. W. 532]). The information then averred that the bonds in question were valid, and certain of the defendants were publicly proclaiming their invalidity. It prayed that the court pass upon, and certify to the legality of, these bonds, and restrain defendants from further asserting to the contrary. Twelve propositions which are set out in the opinion referred to were propounded to the court for consideration. Answers were filed by three of the defendants asserting the validity of the bonds they represented and joining in the prayer that all questions touching the legal-

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ity of the budget and the bond issues be definitely determined. Other defendants demurred to the information "because it does not show a legal injury." The trial court held it had "no jurisdiction to render an opinion upon the twelve questions asked" and sustained the demurrer, dismissing the information. In the form the matter was then presented, the action of the trial court was sustained by this court; it being the opinion that the questions were purely academic, there being in the information "a mere statement of the proceedings taken to issue said bonds and the importance of a determination of their validity, without any averment of illegality in the proceedings or breach of any official duty." Following this opinion, after the record was remanded, the information was amended, by permission of the court; the general demurrer being allowed to stand as originally filed, and the matter was again submitted to the court below. The amendment was in part as follows:

"To make this information intelligible and to invoke the jurisdiction of the court to declare said tax levy and bond issues legal or illegal, the attorney general, on the relation aforesaid, gives the court to understand and be informed that said proposed bond issues and each of them are excessive and illegal, including the water bonds prepared to be issued by the board of commissioners.

"(10) That the said bond issues, so far as they are found excessive and beyond the limits fixed by charter or law or are otherwise illegal, may be declared invalid, and that the city of Detroit, the common council, the city controller and the board of water commissioners may be enjoined from selling or in any way negotiating a sale of said bonds."

The circuit court held most of the proposed bond issues to be illegal for the reason that they were in excess of the 2 per cent. limit of indebtedness fixed by law, and granted an injunction restraining their sale except in so far as they are now authorized to the amount of $120,000 found to be within the limit. From this relator appealed. In this appeal a brief has been filed and argument made in sup-

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port of the bonds proposed to be issued by the board of water commissioners.

In the meantime the Detroit library commission, the board of education, and the board of health of the city of Detroit, in separate suits, petitioned the circuit court of Wayne county for writs of mandamus to compel the respondent David E. Heineman, city controller, to advertise and sell their respective bonds, which had been authorized by the electors, common council, and board of estimates, under regular proceedings taken according to law; said respondent having declined to do so under advice obtained from the corporation counsel. So-called answers, amounting in effect to demurrers, admitting the facts but denying the legal conclusions, were filed. The three petitions were then by stipulation and order of the court merged and submitted together as one proceeding. The trial court again held the bond issues in excess of $120,000 illegal, for the reason that they would raise the bonded indebtedness of the city above the 2 per cent. limit. The proceedings were then removed to this court by writ of certiorari and the various entanglements which surround the proposed bond issues of the city of Detroit are now before this court. The vital question is whether or not the proposed issues swell the gross debt of the city of Detroit beyond the 2 per cent. limit based on the assessed valuation of its real and personal property to which it is restricted by the city charter and the so-called "home rule" act of 1909.

In support of the legality of said issues, it has been urged that the limit was raised by Act No. 302 of the Local Acts of 1911 to 3 per cent., which is not exceeded by the proposed increase of indebtedness. The constitutionality of said Act No. 302 being in doubt, it is further urged, in support of the various issues by their respective representatives, that the board of education of the city of Detroit and the Detroit library commission are distinct and independent corporations, for educational purposes only, created by acts of the legislature under its general powers to maintain and enforce a free school system

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throughout the State; that said acts are not part of the charter of the city in the usual and legal meaning of the term; and that therefore their bonds should not be included in computing the bonded indebtedness of the city for municipal purposes. This contention is relied upon by the board of health, which points out and urges that, if the school bonds and library bonds outstanding are not included in the gross indebtedness of the city, the 2 per cent. limit would not be exceeded by all the issues proposed; also urging that the bonds of the board of health are for necessary improvements to preserve and promote the public health. On behalf of the board of water commissioners it is also asserted that it is an independent corporation, created by an act of the sovereign legislature of this State in its early history (1853); that its rights and duties are independent of municipal interference and well defined by the law creating the board, and subsequent amendments, which have been upheld in numerous decisions of this court. It is also pointed out that its authority to bond comes by direct legislation, distinct from the city charter, for which reason its indebtedness is not to be included in the restriction placed by the charter on the amount to which the city is limited.

The important questions before us are:

First, the constitutionality of Act No. 302, Local Acts of 1911.

Second, Are the library board, board of education, and board of water commissioners independent corporations, distinct in character from the municipal corporation of the city of Detroit to the extent that the 2 per cent. limit does not apply to their bonds?

At the time of the adoption of the Constitution of 1909, the existing city charter of Detroit (section 7, chap. 11 [Act No. 326, Local Acts 1883]) limited the gross debt of the city to 2 per cent. of its assessed valuation. The Constitution of 1850 authorized special legislation, or local acts, for the incorporation of cities. This came to be regarded as objectionable and a growing evil, which the

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Constitution of 1909 sought to remedy by the following provisions on the subject (art. 8):

"SEC. 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

"SEC. 21. Under such general laws the electors of each city and village shall have power and authority to confirm, adopt and amend its charter, and, through its regularly constituted authority, pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this State."

Under this constitutional mandate the legislature of 1909 passed what is known as the "home rule" act. Act No. 279, Pub. Acts 1909. Being required by the Constitution to "restrict powers of borrowing money and contracting debts," the act fixed the limit at 8 per cent. of the assessed valuation, but provided that in cities where the amount of money which may be borrowed is now limited by law, such limit shall continue until it shall be raised or lowered by a two-thirds vote of the electors, and that each existing city should continue with all its present rights and powers until otherwise provided. By Act No. 302 of the Local Acts of 1911, it was sought to amend section 7 of chapter 11 of the Detroit city charter increasing the limit of indebtedness to 3 per cent. This palpable attempt to amend the charter in violation of the constitutional inhibition has no suggestion of justification beyond section 30 of article 5 of the Constitution, which provides:

"The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question."

Counsel do not now seriously contend that a genera lact could not be made applicable, and we have no hesitation

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in holding that it could. The law is clearly unconstitutional and void.

The limit of the gross debt of the city of Detroit for strictly municipal purposes was and is fixed by the charter at 2 per cent. of the assessed valuation, and under the Constitution and home rule act it can only be changed by a general revision of the city charter made pursuant to the provisions of the home rule act.

We then come to the question: Must the school and library bonds be included in computing and limiting the gross indebtedness of the city of Detroit as contemplated by its charter?

With reference to the library and school bonds, the same laws and rules of construction apply. The act incorporating the Detroit library commission provides that its commissioners shall be elected by the members of the board of education. Both the Constitution of 1850 and the new Constitution of 1909 require the legislature to establish at least one library in each township and city. It is held that libraries are a recognized factor of civilization, a valuable instrumentality in education, that they enlarge and supplement the work of schools, are within the proper range of school apparatus, and free public libraries are supplemental to, and a part of the educational system of the State. *Maynard* v. *Woodward*, 36 Mich. 423.

Early in the history of this country the foundation of our free school system was laid in the ordinance of 1787, providing fundamental laws for the region northwest of the Ohio river and setting it apart for future division into States. Special emphasis was given to the subject of general education in the familiar declaration that religion, morality, and knowledge, being essential to good government and the happiness of mankind, "schools and the means of education shall be forever encouraged." This language has been preserved and perpetuated in the Constitutions and statutes of our State, and our free school system has been organized, fostered, and supported by constitutional provisions and legislative enactment, as a

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primary and distinctive function of State government held under State control. Its administration, however, has been committed in its details to local agencies of limited territory, designated district boards or boards of education, co-operating with, and more or less closely allied to, municipal corporations for local government which exist in the form of cities, villages, and townships covering the same territory; but the matter of universal and compulsory education, and the support of free schools to that end, has been held apart from the organization and maintenance of cities and villages for strictly local government and municipal conveniences.

The contention was early made that the general State policy is opposed to all connection between State and village government and school administration; but it was held that such was not the case, there being no natural antagonism or incongruity, though "strict regulations are necessary to prevent our city and village organizations from drawing to themselves the supervision of the common schools within their borders." *Hatheway* v. *Sackett*, 32 Mich. 97. The close relations existing between the educational system and general municipal system are discussed and various decisions upon that subject are reviewed by Justice CAMPBELL, in an opinion filed in *Belles* v. *Burr*, 76 Mich. 1 (43 N. W. 24). In that case the learned Justice was not in harmony with the majority on the main issue, which involved the right of a female guardian of a child included in the school census to vote at a school meeting, but we can profit by, and well indorse, that portion of his opinion wherein he notes a tendency in some of the decisions to so closely blend the two systems as to subordinate the school system to the position of a municipal adjunct or agency of the local government, and further points out that, by an amendment in 1879 of section 12 of article 13 of the Constitution, if there was any ambiguity before, now—

"City boards of education are as distinctly recognized

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constitutional bodies as any other elective bodies. There is no city in the State where the board of education has not power to affect the property of nonresidents as well as of residents, by public burdens; and under the Constitution all powers of government must come from the electors made such by the Constitution itself. The board of city school authorities is a body having a larger control than township boards. It has all their powers, and more, and it is by the Constitution made the correlative body to the township board."

School boards have been uniformly held to be separate and distinct corporations. It has also been held that they are municipal corporations and State agencies. *Maynard* v. *Woodward, supra; Board of Education* v. *City of Detroit*, 30 Mich. 505; *School District* v. *Gage*, 39 Mich. 484 (33 Am. Rep. 421); *Tibbals* v. *Board of Education*, 39 Mich. 635; *Pingree* v. *Board of Education*, 99 Mich. 404 (58 N. W. 333); *Attorney General* v. *Lowrey*, 131 Mich. 639 (92 N. W. 289); *Attorney General* v. *Board of Education*, 154 Mich. 584 (118 N. W. 606). It was said by Justice COOLEY, in *Board of Education* v. *City of Detroit, supra:*

"And the board of education, though existing for purposes strictly public, is nevertheless a distinct corporation from the city, having its distinct property and funds, and entitled to demand for them the same protection which may be demanded by other corporations or individuals."

In *Attorney General* v. *Board of Education, supra*, this court said:

"Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature."

The question now is to what extent the legislature has chosen to make it such in the case under consideration.

The Constitution of 1909, like that of 1850, treats education and local government as distinct subjects, in separate articles independent of each other. Article 11 is devoted

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to "Education," and article 8 to "Local Government." These separate articles impose on the legislature the duty of providing, in one instance for a free school system, and in the other for the organization of cities, villages, and other entities of local government for the convenient administration of local affairs. The home rule act, passed pursuant to the provisions of the new Constitution, simply keeps the city of Detroit, where it was under its former charter, subject to all its provisions and restrictions until proper steps have been taken in conformity with the act to revise the charter. Beyond that the construction of the act is unimportant here, except to note that the distinct entity of the school system is carefully observed by language of exclusion. Each city incorporated under that act is required to provide "for the levy, collection and return of State, county and *school taxes* in conformity with the general laws of the State." It is further provided that "the subjects of taxation for municipal purposes shall be the same as for the State, county and school purposes under the general law," thereby sharply distinguishing taxation for municipal purposes from taxation for school purposes. The intent to keep school organization distinct is further shown in the following language wherein a city is authorized to provide—

"For the establishment of any department that it may deem necessary for the general welfare of the city, and for the separate incorporation thereof: *Provided, however*, that these provisions shall not be construed to extend to public schools."

As to education and local government the new Constitution and the home rule act but follow the general scheme of former Constitutions and former acts, only emphasizing and more freely opening the way for local self-government. We therefore, in the light of this well-settled and long-continued policy of distinct school organization, must inquire whether the legislature, in enacting a charter for the city of Detroit under one article of the Constitution, intended that the restrictions placed

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on indebtedness for municipal purposes should be extended beyond the subject of such article and control the finances of the public school system, another subject provided for in a different and distinct article.

The school district of Detroit is co-extensive in geographical limits with the city. Each is an independent public corporation. Public corporations organized for the same purpose, with the same rights, powers, and duties, could not exist in the same territory (*Scrafford* v. *Gladwin County Sup'rs*, 41 Mich. 647 [2 N. W. 904]); but where they are organized for different purposes, have different rights and duties relating to entirely distinct matters, they may and often do occupy the same territory, working in harmony each within the scope of its authority. In such cases the burden of maintenance falls, as a rule, on the same persons and property, and for such corporations to be so organized as to co-operate in the conduct of their several affairs and avoid duplication of agencies essential to each tends to economy and convenience. It is well settled that making a person an *ex officio* officer of one organization by virtue of his holding office in another does not tend to merge the two organizations. *People* v. *Edwards*, 9 Cal. 286; *People* v. *Ross*, 38 Cal. 76; *Hemingway* v. *Stansell*, 106 U. S. 399 (1 Sup. Ct. 473).

The school system of the city of Detroit was created by separate enactments under that article of the Constitution relating to education. Early provision was made by special legislation for a system of public schools in the city of Detroit. The present law, entitled "An act relative to free schools in the city of Detroit," approved February 24, 1869 (Act No. 233, Laws 1869), as amended, provides that the city of Detroit shall be considered one school district under the direction and regulation of the board of education, free to all children residing within the limits thereof between the ages of 5 and 25 inclusive. The members of the board of education are elected every alternate year when the judges of the Supreme Court are required to be elected. Votes cast for them are deposited

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in separate ballot boxes from those used for other city officials. The school inspectors, together with the mayor, controller, and recorder of the city (who are declared to be *ex officio* school inspectors with a right to a seat at the meetings of the board but no power to vote) are a body corporate, known and distinguished by the name of the "Board of Education of the City of Detroit," and in that name have power to sue and be sued, hold and sell property, and transact such other business as the interests of the school require. Said board has full control over the school funds and authority to apply for and receive all moneys appropriated for primary schools and the Detroit library. Elaborate provision is made for the control and management of the school system, accumulation of property and erection of buildings necessary for school purposes, for hiring superintendents and teachers and other necessary employés, providing for retiring and pensioning superannuated teachers, and for all other things necessarily and naturally appertaining to the conduct of a large school system.

The act contains a scheme of finance and taxation which provides that the board of education shall transmit to the common council, through the city controller, each year an estimate of the amount of money which the board deems necessary for the proper maintenance of the public schools of the city during the fiscal year next ensuing, which estimate, so far as practicable, shall be made in detail. Said board is required at the same time to transmit such estimates as are deemed necessary for the purchase of lots, the erection and remodeling of school buildings, the purchase of necessary furniture, fixtures, etc. So much of these estimates as the common council and board of estimates of the city of Detroit approves is to be levied and collected "in addition to all other taxes authorized by law to be assessed in said city." The city treasurer is made the custodian of the moneys for the board of education, and is required to give bonds for the safe handling of the same. School taxes are to be put upon the roll of the city

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in a separate column distinct from other city taxes. The law also provides that every resolution or proceeding of the board of education, whereby any liability or *debt* may be created, etc., shall, before it takes effect, be presented by the secretary of the board to the mayor of the city of Detroit. If he approves the same, said resolution goes into effect. The law also provides that the common council, with the consent of the board of estimates, may cause the whole or any part of the appropriation for the purchase of lots and erection of school buildings to be made by issue of bonds in lieu of raising the same by taxation. While certain of the city officials *ex officio* act for and with the board of education in carrying out its scheme of finance, all these provisions are separate and distinct from any provisions in the city charter, which deals with strictly municipal expenses and indebtedness. While the mayor and common council of the city have a restraining control over the estimates made by the school board and may reduce the same, even though the charter limit of 2 per cent. is not reached, it may be regarded as a discretionary power, conferred by the school act for the common interest, to harmonize and balance expenditures between two coextensive and co-ordinate corporations of the same territory supported by the same community.

The limit of indebtedness under consideration is found in section 7, chap. 11, of the Detroit charter, and provides that—

"The gross debt of the city after deducting the means in the sinking fund of said city and not including the water debt, shall never exceed two per cent. of the assessed value of all the real and personal property in said city."

By section 11 of the same chapter it is declared:

"The common council shall not have authority, except as herein specially provided, to borrow any sums of money whatsoever on the credit of the corporation."

By section 14 of the same chapter it is provided:

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"All bonds and evidences of debt issued, and all contracts made or entered into contrary to or not authorized by the provisions of this act shall be absolutely void."

Culling out these limitations and taking them literally, giving the words general application and their "natural and ordinary meaning" as such, no money could be raised in the city of Detroit for educational purposes either by taxation or bonds. Manifestly such was not the intent. Such language must be interpreted, and its meaning ascertained, not only from the words used, but the subject-matter to which they relate, and in the light of other provisions of the charter and other laws in existence at the time.

The purpose of a statute must be indicated by its title. The title of the charter of the city of Detroit gives no notice that the educational system is involved. It makes no provision for it.

"The application of particular provisions is not to be extended beyond the general scope of a statute unless such extension is manifestly designed. Legislatures, like courts, must be considered as using expressions concerning the thing they have in hand; and it would not be a fair method of interpretation to apply their words to subjects not within their consideration, and which, if thought of, would have been more particularly and carefully disposed of." *Estate of Ticknor*, 13 Mich. 44.

It is a rule of construction that the meaning of the legislature is to be obtained from the subject-matter being dealt with, as well as the meaning of the words used, and the words used are to be limited to the object the legislature intended to apply them to. *Lessee of Brewer* v. *Blougher*, 14 Pet. (U. S.) 178; *United States* v. *Palmer*, 3 Wheat. (U S) 610.

We think fair rules of construction limit the phrase "gross debt of the city of Detroit," found in the charter provisions relating to taxation and finance, to the specific object which the legislature had in mind, which was the power of the city authorities to incur indebtedness for

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strictly municipal purposes and activities, and not a limitation on one of the sovereign powers of the State of general jurisdiction and application. Taxes and bonds for school and educational purposes are not for city or municipal purposes. The legislature, enacting a comprehensive scheme of local government for a large and rapidly growing city, omitted absolutely from its charter any provision for the maintenance of the public schools and wholly ignored the subject. We must conclude this was intentional, done with the knowledge that other laws controlled the subject of education and other provisions had been and would be made for financial support of the school system; hence the charter was confined strictly to "local government," to the exclusion of "education," and the limit of indebtedness was directed strictly to expenditures for local government, its necessities and conveniences.

We think this case distinguishable from those decisions in other States where, under other statutes, certain indebtedness for school purposes has been aggregated with that for city purposes to determine the debt limit as fixed by comprehensive, constitutional provisions of general application, which declare that no political or municipal corporation shall become indebted in any manner for any purpose to any amount in the aggregate exceeding a certain sum. Here a city charter, dealing with a particular subject, fixes a limit as to that subject.

Guided by the foregoing considerations, we are constrained to hold that the school bonds and library bonds of the city of Detroit were not intended to be, and are not, included in the 2 per cent. limit of indebtedness for municipal purposes specified in the charter

As these conclusions relieve the other bonds involved in this controversy from the imputation of exceeding the debt limit, the special questions relating to them become unimportant and need not be further considered.

Judgment is reversed, and the proceedings are remand-

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ed for such further action as may be necessary in the premises under this opinion.

MOORE, C. J., and BROOKE, BLAIR, and STONE, JJ., concurred.

MCALVAY, OSTRANDER, and BIRD, JJ., did not sit.

In re PRICE.

ABANDONMENT—CRIMINAL LAW—VENUE—HUSBAND AND WIFE—DESERTION—JURISDICTION.

Desertion of a wife by the husband takes place in the county of which the wife is a legal resident, and in which she becomes dependent, so that a prosecution under Act No. 144, Pub. Acts 1907, is properly brought in the county of her legal residence although the husband never lived there.

Habeas corpus by Herbert W. Price against Leo J. Rimmele, sheriff of Saginaw county, to secure his discharge from custody after conviction. Submitted February 27, 1912. (Calendar No. 25,034.) Writ denied February 29, 1912.

Thomas W. Payne, for petitioner.

Bird J. Vincent, Assistant Prosecuting Attorney, for respondent sheriff of Saginaw county.

STONE, J. The return of the sheriff of Saginaw county shows that the petitioner, after criminal proceedings taken against him for desertion and abandonment of his wife, has been convicted of that offense in the circuit court for the county of Saginaw, and after conviction was remanded,

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by order of the said court, to the custody of the said sheriff to await sentence, and is now in such custody; the proceedings being substantially as follows: After due arrest upon a warrant issued upon complaint of his wife, and after due examination under the statute, and after having been duly held for trial in the circuit court aforesaid, an information was duly filed, charging that the petitioner, on, to wit, the 2d day of April, 1911, at the city and county of Saginaw, unlawfully and feloniously did desert and abandon one Amy V. Price, she, the said Amy V. Price, being then and there, and from thence hitherto until the 3d day of July, 1911, the wife of the said Herbert Price, without providing her, the said Amy V. Price, with proper food, care, and clothing, and did then and there feloniously and unlawfully leave said Amy V. Price, his said wife, as aforesaid, a burden upon the public, within the meaning of Act No. 144 of the Public Acts of the State of Michigan of 1907, contrary, etc The petitioner, upon arraignment, having stood mute, a plea of not guilty was entered by order of the court, and a trial by jury was had, resulting in a verdict of guilty, and said petitioner is now in the custody of the sheriff, by order of said court, awaiting sentence

In his petition for the writ of habeas corpus, the only illegality complained of by petitioner is:

"That the circuit court for the county of Saginaw has not got jurisdiction for wife abandonment by your petitioner, inasmuch as your petitioner never lived with the complaining witness in the city of Saginaw, county of Saginaw, that your petitioner was married to the complaining witness when she was a resident of Grand Rapids, county of Kent, and your petitioner, at the time of said marriage, was a resident of Marquette county, State of Michigan. That your petitioner, at the time of his arrest, was a resident of Wayne county, State of Michigan, and never was a resident of Saginaw county. That if your petitioner is guilty of abandonment he did not commit abandonment in the county of Saginaw, as alleged."

Upon the hearing before this court, it was conceded by

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the petitioner that the said Amy V. Price became a legal resident of the city and county of Saginaw in the month of September, 1910, and so continued to the time of his trial, as aforesaid. The single question for our consideration, therefore, is whether, under the circumstances above disclosed, the circuit court for the county of Saginaw had jurisdiction to hear and determine said criminal case.

The statute provides that:

"Any person who deserts and abandons his wife, or deserts and abandons his minor children under fifteen years of age and without providing necessary and proper shelter, food, care and clothing for them, shall upon conviction be deemed guilty of a felony," etc.

After making provision for suspended sentence upon the giving of a bond, and providing for a modification of the order in certain cases, the statute provides that, in case of sentence to one of the State prisons, the warden where such convicted person is confined shall pay over to any of the superintendents of the poor of the city or county in which the wife or children of such person resides a certain sum for her or their support, said sums to be expended by said superintendents of the poor for the care and support of the wife or children of said person, as the case may be; and it is made the duty of the superintendents of the poor of the city or county from which such person shall be committed to furnish the warden of the prison in which such person is confined with a sworn statement, showing the names of the wife and children who are left dependent upon the city or county for support, etc.

Section 4 of the act provides that:

'Any of the superintendents of the poor of the city or county, or the county agent of the State board of corrections and charities for the county wherein the wife or minor children of the person complained of reside, may make the complaint."

It seems clear to us that, the wife being a legal resident

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of Saginaw county, the offense is committed in failing to perform the duty of support imposed by law, in that county. That is the proper county of the venue.

In 12 Cyc., at page 237, it is said:

"It has been held that the crime of abandoning one's family is properly laid in the county where the accused sent his wife and children, and where they became dependent, although he may never have been in that county"—citing *Johnson* v. *People*, 66 Ill. App. 103.

In 29 Cyc. p. 1678, the author says:

"In order to warrant a conviction for abandonment, the desertion must have taken place within the State; but the place where the children were, and not where the father was, at the time or during the period complained of, fixes the venue of a prosecution for nonsupport of the children" —citing *Bennefield* v. *State*, 80 Ga. 107 (4 S. E. 869); *State* v. *Peabody*, 25 R. I. 544 (56 Atl. 1028).

In *Johnson* v. *People*, *supra*, the court said:

"It may be conceded that under the laws of this State a defendant can only be tried in the county where the offense was committed. Hence, if the defendant in this case did not abandon his wife and children in Peoria county, he was improperly tried and convicted there. But it is to be observed that the personal presence of the offender is not always an indispensable element in fixing the local jurisdiction of a criminal offense. A crime is, in legal contemplation, committed in the place where the doer's act takes effect, whether he is himself in such place or not; in this way one may even perpetrate an offense against a State or county upon whose soil he never set foot. 1 Bishop's New Crim. Proc. § 53; 1 Bishop's New Crim. Law, §§ 110, 111."

To the same effect are the following cases: *Cleveland* v. *State*, 7 Ga. App. 622 (67 S E 696), where it was held that the offense of abandoning one's child and leaving it in a dependent condition is consummated, and in the legal sense committed, in the county where the state of the child's dependency upon others begins, on account of the withdrawal by the father of his presence and aid in the way of support *State* v *Sanner*, 81 Ohio St. 393

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(90 N. E. 1007, 26 L. R. A. [N. S.] 1093), where it was held that, as to some crimes, the physical presence of the accused at the place where the crime is committed is not essential to his guilt; citing *Burton* v. *United States*, 202 U. S. 344–387 (26 Sup. Ct. 688, 6 Am. & Eng. Ann. Cas. 362); *Norris* v. *State*, 25 Ohio St. 217 (18 Am. Rep. 291); *Lindsey* v. *State*, 38 Ohio St. 507. To the same effect is the case of *State* v. *Dvoracek*, 140 Iowa, 266 (118 N W. 399), where it was held that one who neglected to provide for his wife and children, in violation of the statute, was properly indicted in the county in which the duty to provide for them should be discharged; that is, in the county where they resided.

We are of opinion that the circuit court for the county of Saginaw had jurisdiction to hear and try the case; that the petitioner is not entitled to be discharged from cus tody; and it is the order of the court that he be remanded to the custody of the sheriff who produced his body in court.

MOORE, C. J., and STEERE, MCALVAY, and BROOKE, JJ., concurred.

HUBER *v.* TWIN CITY GENERAL ELECTRIC CO.

1. EVIDENCE — MASTER AND SERVANT — ELECTRICITY — REPAIRS — DEFECTIVE INSULATION.

   It was competent, in an action by a lineman for injuries caused by defective insulation, to show that a guy wire, of which plaintiff took hold, became charged on two previous occasions, that the defendant was notified of the situation and made repairs which were insufficient to obviate the alleged imperfect insulation.

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2. MASTER AND SERVANT—DEGREE OF CARE.
That defendant was contemplating an immediate alteration in its entire construction did not change its duty to employés.

3. SAME.
An electric power company, engaged in producing currents of high voltage, is charged with the duty towards its employés of exercising a very high degree of care because of the extremely hazardous nature of the business.[1]

4. SAME—RISKS ASSUMED—INSULATION OF WIRES—ELECTRICITY.
While a lineman was chargeable with the assumption of such risks as are incident to the business, and such as grow out of dangers that he knew, or in the exercise of due care should have known, he did not assume the risk of a danger as to which the employer had actual notice and neglected to warn the employé.

5. SAME—CONTRIBUTORY NEGLIGENCE.
Whether he should have anticipated that a guy wire not usually charged might conduct a charge of electricity from an adjacent high voltage wire was a question for the jury.

6. SAME—DAMAGES.
A verdict of $2,500 for dislocation of an arm, resulting in weakness of the muscles and occasional pain nearly a year after plaintiff's injury, by which he was disabled from work for about 20 days, should not be set aside as excessive.

Error to Gogebic; Cooper, J. Submitted November 10, 1911. (Docket No. 85.) Decided March 12, 1912.

Case by Bartholomew Huber against the Twin City General Electric Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Charles M. Humphrey, for appellant.

M. M. Riley and *L. S. Rice*, for appellee.

Plaintiff, a man 40 years of age, had for 20 years been following the occupation of an electric lineman. He was experienced in the handling of live wires. In his work he customarily repaired electric light, telephone, and tele-

[1] Liability of electric company to employé for injury caused by electric shock, see note in 32 L. R. A. 351.

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graph wires. These wires sometimes carried a high voltage. He had handled those carrying as high as 4,000 volts. In the spring of 1909 the defendant was engaged in changing the character of its transmission line to a more modern and economic system. In so doing it became necessary to remove the live wires from the old poles to the new, and to take down and remove the old ones. Plaintiff secured employment upon this job as a man of experience, and had worked thereon for about two months prior to the date of his injury, July 6, 1909. On the morning of that day he came to a pole which carried the wires around a corner. This pole was sustained by two guy wires which ran from the pole at different heights to anchors in the ground. Plaintiff had removed the two lower arms from the pole as well as the lower guy wire. He was ascending the pole to get into position to take off the next arm, when, in order to get in front of his work, he seized the upper guy wire, and received through his body an alternating current of electricity of 1,100 volts. He was unable to release himself from the guy wire for a short time, but finally became unconscious, and would have fallen to the ground but for the fact that his life belt prevented. His companions lowered him by means of a rope, when it was found he had suffered a dislocation of the shoulder. This dislocation was, with considerable difficulty, reduced after plaintiff had been rendered unconscious by the use of an anesthetic. After 20 days plaintiff resumed his work, but claimed that his shoulder pained him at times, and that his arm was weak up to the time of the hearing in the court below, which was May 17, 1910. The guy wire which caused plaintiff's injury had become charged by reason of the fact that the live wire had become released from the pin, or the pin had broken, thus permitting the wire to be drawn against the brace supporting one of the arms. The wire rubbing against the brace destroyed the insulation, and the brace, in turn, carried the current to the guy wire. There was at this corner a strain which had a tendency to break the pins

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carrying the live wires, and the upper guy wire was so placed as to receive the current if the pins broke and permitted the live wire to reach the brace. This particular guy wire had become charged upon at least two occasions previous to the day on which plaintiff was injured. One of these occasions was about two weeks before the day of the injury. Upon each of these occasions the defendant upon being notified sent a man to remedy the defect. The declaration charges negligence, in that the line was improperly constructed, in that the live wires were not properly insulated, and in that defendant, having knowledge of the dangerous and unsafe condition of the wires upon the pole in question, failed to warn the plaintiff of such danger. Plaintiff having recovered a judgment, defendant reviews its case in this court by writ of error.

BROOKE, J. (*after stating the facts*). Defendant contends that the judgment should be reversed for several reasons:

(1) Because the court erred in admitting evidence of the fact that the guy wire had become charged upon two former occasions; it appearing that the defendant upon being notified had at once caused repairs to be made.

(2) Because the court erred in admitting testimony that when repairs were made before the accident they were not made properly.

(3) Because the court erred in admitting testimony that the lines at the place of the accident were not originally properly constructed.

(4) Because the court erred in his charge to the jury.

(5) Because plaintiff was guilty of contributory negligence.

(6) Because plaintiff assumed the risk.

With reference to the first, second, and third reasons assigned, we content ourselves with saying that no error was committed in admitting the testimony of which complaint is made. It must be borne in mind that through the operation of natural laws the strain upon the mechanism used to hold in place the line carrying the deadly

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current around a corner was much greater at that point than upon a straight line. It was, of course, the duty of defendant to so construct its line as to reasonably meet this condition. The fact that through the improper location of the guy wire or the breaking of the pin holding the live wire the guy wire had become charged upon at least two previous occasions, was important, and we think competent, evidence tending to show notice to defendant of the dangerous situation at this point, and such evidence does not become incompetent or immaterial as soon as it is shown that the defendant undertook repairs which the event proved to be inadequate. The character of the repairs made was in our opinion likewise the subject of proper inquiry. It appears that, upon the occasion about two weeks before the day of plaintiff's injury, Boden, who made the repairs for defendant, found (so he testifies) that the insulation on the live wire was cut or rubbed off, he supposed by swaying and coming into contact with the guy. The repairs made consisted in winding some tape about the guy wire which at that point was very close to, but not touching, the live wire. In view of the facts that the guy had become charged, that it was located in a public street, and that when charged it carried a current of high voltage, we think the question of the sufficiency of the repairs made was clearly one for the jury. It was shown by the plaintiff that the pin carrying the live wire was broken, and that the break was an old one. Boden testified that he did not notice the broken pin when he made his repairs. The jury might very well conclude, however, from the other testimony that the pin was broken at that time.

The contention made that, because defendant was about to change its entire construction it owed a less imperative duty in the premises, cannot be maintained. The handling of electrical currents of high voltage is a business extremely hazardous, and those engaged in that business are charged with the duty of exercising a very high degree of care for the protection of life. The charge, to parts of

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which objection is made, when read as a whole, is, in our opinion, not open to criticism. Assuming that no error was committed in the admission of the testimony of which complaint is made, it correctly sets out the claims of the parties and the applicable law.

A more serious question is raised in reference to the assumption of risk. In *Chisholm* v. *Telegraph Co.*, 176 Mass. 125 (57 N. E. 383), it is said:

"The danger from an imperfectly insulated wire is the most characteristic risk which a lineman has to encounter. * * * Everybody knows that there always is a chance that the insulation of a wire may become worn off or defective from some cause."

Again, in *Britton* v. *Telephone Co.*, 131 Fed. 844 (65 C. C. A. 598), the court says:

"Linemen must, in the very nature of the occupation, be often required to work alone, or in association with other linemen, and it would seem quite impracticable and unreasonable to send one man as an inspector with another of equal fitness to test a pole before climbed by the latter."

The case of *Anderson* v. *Telegraph Co.*, 19 Wash 575 (53 Pac. 657, 41 L. R. A. 410), is a case which upon the facts much resembles the case at bar. In that case a lineman of the defendant was injured by coming into contact with a guy wire which had become charged through the breaking of an insulator. It was held that he could not recover, because by the exercise of care he could have discovered the danger In the case of *De Kallands* v. *Telephone Co.*, 153 Mich. 25 (116 N. W. 564, 15 Am. & Eng. Ann. Cas. 593), this court held that a lineman assumed the risk of all dangers incident to his employment which he actually knew or should know. Again, in *Lynch* v. *Traction Co.*, 153 Mich 174 (116 N W. 983), it was held that an experienced lineman assumed the risk of injury resulting from his employer's method of inspection with which he was familiar.

The case at bar, however, we think, is distinguishable from those cited and relied upon by defendant. Here the

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defendant had actual notice of the faulty character of its appliances at the point in question. It is true that the plaintiff by his contract of employment assumed the risk of injury from those dangers which he knew existed, or which in the exercise of care he should have apprehended. The record, however, shows that the office of the guy wire is to maintain the pole in an upright position, and it is supposed to be free from the electrical current. Whether plaintiff should have apprehended the possibility of its being charged and governed his actions accordingly was a question for the jury which was properly submitted. We think, moreover, that the jury might well conclude that, possessing the knowledge which it did possess, it was negligence on the part of the defendant to fail to warn plaintiff of the extraordinary hazard he encountered in climbing the pole in question.

After this case was submitted, a motion was made for leave to amend the record in order that the court might consider the question of the alleged excessive character of the verdict.

The motion may be disposed of by saying that, though not properly before us, we have examined the testimony bearing upon the damages, and are of the opinion that a verdict in the sum of $2,500 is not so excessive as to warrant this court in disturbing it.

The judgment is affirmed.

MOORE, C. J., and STEERE, STONE, and OSTRANDER, JJ., concurred.

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HIGHLAND *v.* TOWNSHIP OF GARFIELD.

HIGHWAYS AND STREETS—DEFECTS IN ROADS—TOWNSHIPS—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was guilty of contributory negligence in attempting to return home from market in the evening along a road which was dangerously narrow and slippery with recent rains, as he knew, where his wagon slid into the ditch, injuring his horse, was a question for the jury.[1]

Error to Mackinac; Shepherd, J. Submitted November 13, 1911. (Docket No. 95.) Decided March 12, 1912.

Case by James Highland against the township of Garfield for injuries to plaintiff's horse resulting from a defective condition of the highway. Judgment for plaintiff. Defendant brings error. Affirmed.

Henry Hoffman, for appellant.

James J. Brown, for appellee.

MCALVAY, J. Plaintiff recovered a judgment in this case against defendant township in an action for damages on account of the loss of a horse, caused, as is claimed, by the negligence of the township in not maintaining a certain highway within its limits in reasonable repair, and in a condition reasonably safe and fit for travel. Defendant offered no witnesses, and at the close of the proofs in the case moved for an instructed verdict on the ground of contributory negligence of plaintiff. This motion was denied. Error is assigned upon such refusal, and this is the only question discussed on the part of defendant and appellant.

[1] Contributory negligence as affecting liability of municipal corporation for defects and obstructions in street, see note in 21 L. R. A. (N. S.) 614.

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The material facts are that plaintiff has resided in the township for 16 years. This highway, known as the "Newberry road," is the main traveled road between Engadine and Newberry, and necessary to be used by plaintiff in going from Donald, the name of the post office near which he lives, to Newberry. This road runs north and south, and plaintiff travels upon it from his home north to reach Newberry. There are hills on this road known as "Eckley Hills," over which it passes. On the east side of the track on the first hill going north is a ditch downhill, the upper portion of which is filled with stone, and the lower part open, which, crowding to the west, encroaches upon the track. It is from a foot to 18 inches wide, and from 8 to 18 inches deep. There were no drains constructed to carry off the rainfall upon the hill, and this one was cut by the water running downhill. The soil is red clay, and recent rains had made the hill slippery. The ditch at the place where the accident occurred runs about in the center of the track, leaving a space on the west side of it of eight or nine feet between it and the embankment on the west side of the road, and side of the hill. It is necessary to go upon this eight or nine feet and pass along in order to avoid getting into the ditch.

On the morning of October 26, 1910, the plaintiff started from home early, driving his team with an empty wagon, bound for Newberry for the purpose of obtaining a load of grain. He came down this hill with care, avoiding this ditch, and, after he had arrived at the foot of the hill, left his team, and went back, as he testified—

"And examined it to see how I was going to get back by it at night, and whether I had better turn back home, and I made up my mind by going to the west as close as I could to the embankment, if the wagon stayed there, that I could go by, keeping as tight to the west side of the road as I could."

He proceeded to Newberry, got his load, and started on his return home at 3 o'clock in the afternoon. He arrived at this hill about 9 o'clock. It was very dark, and, when

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he came to this place, he got off the wagon, and felt with his feet on the west side to know how close he was to the west side of the cut in order to keep clear of the ditch. He says:

"This turn was the only turn to use. It was the beaten track that had been made by teams passing this ditch."

He then mounted his wagon, and drove about two wagon lengths. The ground was sloping and the wagon slipped sideways into the ditch, throwing the horse and injuring it so severely that it became worthless. Plaintiff had gone over this hill several times that season, and knew its condition. He and other witnesses say that it was unsafe and dangerous. He had no lantern with him that night. The record shows that the road had been in this condition from one to three years, of which the authorities had actual notice. The dangerous conditions were during the break-up in the spring and after considerable rains. It was used by the public at all seasons, and for the most of the time was in a reasonably passable condition.

Appellant contends that the case is controlled by *Black* v. *City of Manistee*, 107 Mich. 60 (64 N. W. 868); *Church* v. *Village of Howard City*, 111 Mich. 298 (69 N. W. 651, 66 Am. St. Rep. 396), and like decisions. We think that the instant case is distinguishable from that line of cases. In the first case cited plaintiff was perfectly familiar with conditions. She saw the icy sidewalk, and knew that it was dangerous, yet she proceeded without using any care whatever, refusing and neglecting to take hold of the handrail, and the court says:

"It was not a case where to proceed was the only alternative."

In other words, she made no attempt to avoid injury. In the second case cited, *supra*, the court said:

"The case is ruled by *Black* v. *City of Manistee*, 107 Mich. 60 [64 N. W. 868]. In that case plaintiff neglected to guide herself by the handrail when passing over an icy sidewalk."

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The learned trial judge held that it could not be said as a matter of law that plaintiff was guilty of contributory negligence, and submitted the case to the jury under a charge upon which no specific error has been assigned by appellant. By this charge the question of contributory negligence of plaintiff was submitted to the jury as a question of fact. Upon this record our opinion is that the court was not in error in refusing to instruct a verdict for appellant. The case is within the line of cases where this court has held against the contention of appellant. *Harris* v. *Township of Clinton*, 64 Mich. 447 (31 N. W. 425, 8 Am. St. Rep. 842); *Schwingschlegl* v. *City of Monroe*, 113 Mich. 683 (72 N. W. 7); *Handy* v. *Township of Meridian*, 114 Mich. 454 (72 N. W. 251); *Gage* v. *Township of Pittsfield*, 120 Mich. 436 (79 N. W. 687).

The judgment of the circuit court is affirmed.

STEERE, BLAIR, STONE, and OSTRANDER, JJ., concurred.

FLEMING *v.* GEMEIN.

1. INTOXICATING LIQUORS—CIVIL-DAMAGE ACTION—NOMINAL DAMAGES—HABITUAL DRUNKARD.

   Under undisputed evidence that defendant sold plaintiff's husband, an habitual drunkard, intoxicating liquors, after having been notified not to do so, that plaintiff was injured in the matter of her support, suffered personal violence at his hands, that her property was destroyed and she suffered in her feelings, a verdict of six cents damages was against the weight of the evidence and should have been set aside on motion for a new trial.

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2. SAME — HUSBAND AND WIFE — PRIVILEGED COMMUNICATIONS — WITNESSES.

The court erred in refusing to admit testimony of the wife as to her husband's conduct while he was intoxicated from liquor sold by defendant: the evidence was not of a privileged character.

Error to Wayne; Donovan, J. Submitted November 14, 1911. (Docket No. 101.) Decided March 12, 1912.

Case by Jennie Fleming against John J. Gemein for unlawful sales of intoxicating liquor to plaintiff's husband. A judgment for plaintiff for six cents is reviewed by plaintiff on writ of error. Reversed.

Harry H. Wait (*William L. January*, of counsel), for appellant.

James H. Pound, for appellee.

MCALVAY, J. Plaintiff sued defendant, who was engaged, in the city of Detroit, in the business of conducting a saloon as a retail liquor dealer, under the statute, claiming damages for unlawfully selling malt, brewed, spirituous, and intoxicating liquors to her husband, who became and was an habitual drunkard to the knowledge of defendant, and after the defendant had been notified by her verbally and in writing not to sell to her husband, for the reason that he was an habitual drinker, and an habitual drunkard. There is no question raised as to the sufficiency of the declaration in the case. The case was tried in the Wayne circuit court, and resulted in a verdict for six cents damages for plaintiff. A motion for a new trial was made on the ground, among others, that the verdict was contrary to the weight of the evidence and clearly inadequate. This motion was denied.

Plaintiff asks a reversal on account of error assigned upon the rulings and remarks of the court in excluding testimony offered by plaintiff, upon certain portions of the charge to the jury, and upon the denial of the motion for

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a new trial. It will not be necessary to consider all of the errors assigned. Attention will be given to those of material importance.

The material facts appear from this record: That plaintiff was married at Detroit in 1895 to William Fleming, a skillful and competent machinist, at that time and still in the employ of the Railway Steel Spring Company. That he was then earning $2.50 a day, which in a year or two was raised to $2.75 a day, and in December, 1903, he was appointed master mechanic at $85 a month. About six months after the marriage he began to drink moderately, which continued for a year or two, when he began to drink to excess, during which period he would come home intoxicated, and spent practically all his earnings in defendant's saloon. This continued until 1901, when he was laid off from his work by the master mechanic. Defendant was notified at that time by the master mechanic not to sell Fleming any more intoxicating liquors. After that Fleming did not drink for about a year. He began again in 1902–1903, and gradually grew worse until May, 1908. During this time he spent all his evenings, sometimes until midnight, at defendant's saloon, which was located next to the plant where he worked. He came home frequently intoxicated, using vile language towards his wife, and sometimes assaulting her violently, and smashing her furniture.

Prior to acquiring the habit of becoming intoxicated and during the period when he quit drinking, Mr. Fleming always treated his wife with kindness and great consideration. During that time he turned over to her a large portion of his earnings, with which she paid all the bills and home expenses. In 1903, when he was again drinking hard, he spent practically all his money in defendant's saloon, not furnishing his wife enough for support and to pay rent, and she was obliged to open a millinery store, from the proceeds of which she supported the family. This continued until 1908. Some time in October, 1906, he once came to the store intoxicated, threw her through the store

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door, and broke up some of the furniture. On account of this violence, she became sick and was unable to do her work. For three weeks she was afraid to stay in the store, and rented a room or stopped with her neighbors. She notified defendant verbally not to sell her husband liquor, at which time he said it was none of her business how her husband spent his money. She also, October 6, 1906, served a written notice on him forbidding him selling to her husband intoxicating liquors, for the reason that he was in the habit of getting intoxicated and was an habitual drinker. Defendant continued to sell and furnish him liquors to drink until as late as March, 1908. From an account furnished by defendant in a garnishee suit brought against Mr. Fleming for a claimed balance on saloon account of $138.20, it appears that he had sold and charged plaintiff for liquors about $800. This did not include any drinks for which cash had been paid. It appears that Mr. Fleming quit drinking in 1908, and at the time of the trial in December, 1909, continued to abstain from all intoxicants. There is practically no dispute in the record as to the foregoing facts.

The only witness for the defense was defendant, whose direct examination was brief. He admitted selling to Mr. Fleming both before and after notice. He claimed that Mr. Fleming never became intoxicated, and never lost any time from his work. He admitted that plaintiff and her young son used to come to his place quite frequently after Mr. Fleming to get him to go home.

Of the errors assigned we will first consider the denial of a new trial. From this record it is apparent that the verdict of six cents damages was contrary to the great weight of the evidence, and grossly inadequate. The undisputed evidence tended to show that defendant sold plaintiff's husband intoxicating liquors after being notified that he was an habitual drinker, and in the habit of becoming intoxicated, and did become intoxicated upon liquors so sold to him by defendant; that this plaintiff suffered materially in the matter of her support; that she suffered

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personal violence and was made sick by her husband's assaults; that her property was destroyed; and that she suffered damages to her feelings in shame, humiliation, and disgrace, all by reason of the conduct of her husband, caused by the unlawful sale of liquors made to him by defendant, and there was abundant evidence tending to show that she was entitled to substantial damages for such injuries. The court was in error in denying such motion.

Upon the offer of evidence by the plaintiff relative to the acts and conduct of the plaintiff's husband when he was intoxicated at the times referred to in the statement of facts, the court refused to allow plaintiff to testify. Several errors are assigned upon such rulings and the interjection of prejudicial remarks by the court, as follows:

"*Q.* Will you describe what took place on this occasion, how Mr. Fleming acted, and what he did?"

The court excluded the answer upon the ground that it was a privileged communication; counsel for defendant having made no objection for that reason. In a long statement by the court he refused to change his ruling, because "such testimony would tend to disrupt the family relation and create interminable litigation." The examination of the witness proceeded:

"*Q.* What did he do on these occasions? Counsel for defendant made the same objection.

"*Q.* Leave out what he said to you, what did he do?

"*A.* He struck me.

"*The Court:* You are getting that in. It is inimical to the family harmony."

The court sustained an objection, and ruled the testimony out. The wife was clearly a competent witness to testify as to the conduct of her husband when intoxicated from the effects of liquor unlawfully sold to him by defendant. The court was in error in excluding such testimony.

We have examined the other material errors assigned, and although we think that they are meritorious, we do

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not consider it necessary to discuss them, for the reason that it would be of no benefit to the profession, and there is no probability that they will recur upon a new trial.

The judgment of the circuit court is reversed and a new trial ordered.

STEERE, BLAIR, STONE, and OSTRANDER, JJ., concurred.

MADILL *v.* CURRIE.

1. LIBEL AND SLANDER—PRIVILEGE—TRIAL—CHARGE—EMBEZZLEMENT.

   In libel for publication of language imputing to plaintiff the embezzlement of county funds, it was error to charge the jury that defendant, a county supervisor, was not privileged if the jury could find he imputed to plaintiff a crime, where the objectionable charge was contained in a report made to the public by a letter prepared by defendant as chairman of an investigating committee duly appointed to investigate the accounts of the county treasurer.[1]

2. SAME—QUALIFIED PRIVILEGE.

   It is the occasion that determines the question of privilege, not the language employed.

3. SAME.

   And a report of such chairman upon a matter of public concern, under circumstances showing that the public were interested in knowing the true state of facts, was qualifiedly privileged.

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[1] Privilege as to proceedings for impeachment or removal of public officers, see note in 25 L. R. A. (N. S.) 455.

Privilege of official report by executive or administrative officer, see note in 5 L. R. A. (N. S.) 163.

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4. SAME—BURDEN OF PROOF—JUSTIFICATION—CRIMINAL CHARGE.
Defendant was not required to show that plaintiff was in fact guilty, by testimony sufficient to prove it beyond a reasonable doubt; a mere preponderance would suffice.[1]

5. SAME—CONFLICTING INSTRUCTIONS TO JURY—CHARGE—TRIAL.
When conflicting instructions are given, one of which is erroneous, it is presumed that the jury may have followed that which was erroneous.

6. SAME.
That defendant published his report in a newspaper instead of filing it with the county clerk, does not destroy the qualified privilege.

7. SAME—IMPLIED MALICE—PRESUMPTION.
Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained without proof of express malice.

Error to Bay; Collins, J. Submitted November 13, 1911. (Docket No. 93.) Decided March 12, 1912.

Case by Leslie D. Madill against Gilbert A. Currie for libel. Judgment for plaintiff. Defendant brings error. Reversed.

Gilbert A. Currie and *Julius B. Kirby* (*L. P. Coumans*, of counsel), for appellant.

James Van Kleeck (*Floyd L. Post*, of counsel), for appellee.

STONE, J. This is an action to recover damages for the publication of an alleged libel. Plaintiff is a resident of Midland county, and served as county treasurer for the four years immediately prior to January 1, 1909, and served as deputy county treasurer under his father, John Madill, for the four years immediately prior to January

[1] Pleading and proving truth as defense in libel suit, see note in 21 L. R. A. 511.

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1, 1905. The defendant is also a resident of Midland county, and at the time of the commencement of the investigation hereinafter referred to was a member of the board of supervisors of that county. The board of supervisors of Midland county employed one Charles H. Winke, a certified public accountant, to audit the books and records of the office of the county treasurer for the period of 11 years immediately prior to January 1, 1909. In his report of this audit, the accountant advised that, on account of no definite records having been kept by the county treasurers relative to the rebate transactions, it would be necessary to have an audit made of these transactions in order to determine whether the amounts taken by the county treasurers for rebated county taxes were correct or not. At various times the board of supervisors had passed what are termed "rebate resolutions." These resolutions contained a provision that the purchaser of certain lands therein described (in some instances of State tax lands in designated township), upon which the taxes were delinquent for three years and upwards — that is, State tax lands—could pay the county tax thereon by giving 10 per cent. thereof, and instructed the treasurer to charge the remaining 90 per cent. to the contingent fund. The full amount of the county tax would appear to the credit of the contingent fund, but the treasurer, collecting only 10 per cent. thereof, would charge the contingent fund with 90 per cent. rebated, and thus balance the account. In a number of instances the township boards would adopt similar resolutions and make a like disposition of the township's portion of the taxes delinquent against such lands, and would instruct the township treasurer to receipt to the county treasurer for the amount of county tax thus rebated. These amounts would be charged against the account of a township, but, of course, would have no bearing on the amounts of credit taken for county tax rebated which would be charged to the contingent fund of the county.

The rebate credits taken during the two terms of John

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Madill—January 1, 1901, to January 1, 1905—amounted to $2,473.27. Credits for alleged rebating of county tax were taken by the plaintiff during his first two terms—January 1, 1905, to January 1, 1909—as follows:

In 1905		$3,088 02
In 1906		1,935 14
In 1907		2,225 84
In 1908 as follows:	June 30, $1,556 13	
	Dec. 31, 2,958 63	4,514 76

No records were kept showing either to whom or upon what description such rebates were alleged to have been given. Seven hundred and seventy citizens and electors of Midland county petitioned the board at its January, 1909, session to have these rebate transactions audited, and the board employed said accountant, Winke, to make such audit, and appointed a committee, consisting of the defendant, as chairman, plaintiff, Byron Burch and Robert H. Lane as the other members, which committee was to assist in the investigation and have charge of the same. The board further provided:

"That said expert shall complete his work on said county treasurer's books within thirty days of the time he is employed and shall file his report with the county clerk within thirty days; and said committee shall also file its report with the county clerk within the same time."

The accountant filed with the clerk the report of his audit on February 23, 1910, which report showed a shortage of over $2,900 in the accounts of the treasurer's office for the last five years covered by the audit; that is, during the last year of John Madill's term and the two terms of plaintiff. Before making his report the accountant requested a meeting of the audit committee. The committee met on February 7, 1910, with a stenographer in attendance, and the accountant made known to the committee his findings. The plaintiff, under oath, endeavored to explain the alleged shortage. Some time afterwards, and prior to March 11, 1910, the defendant, who was chairman of the investigation committee, requested the com-

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mittee to join with him in making a report, and notified them that, if they neglected or refused to join with him, he would feel at liberty to make a report.

On March 11, 1910, defendant caused to be published in the Midland Sun a statement or report in the words and figures following, as alleged in the declaration:

"To the Citizens of Midland County:

"Owing to the persistent and almost universal demand on the part of the people of Midland county to know the contents of the certified public accountant's report on the audit of the rebate credits taken by the treasurers for the eleven years prior to January 1, 1910, I have decided to give out this statement upon my own responsibility.

"The audit committee has been in possession of the facts concerning the findings of the accountant since February 7, and the accountant's report has been filed with the county clerk since February 22. Inasmuch, therefore, as the time within which we were expressly instructed to report by the board of supervisors has long since expired, I gave notice to the committee at a meeting Saturday evening last, that if a report was not to be made very soon to the public showing the progress made by us to date, I should feel at liberty to make any statement concerning the matter which seemed to me proper.

"The report of the audit of the three years of Treasurer Burrington's work shows that he took credit for rebated taxes to the amount of $1,285.03, while the audits of the records show him entitled to $1,289.30, a discrepancy of $4.27 in favor of the county. Mr. Burrington also filed, in nearly every instance, a statement showing the descriptions sold upon rebate basis and giving the exact amount that Treasurer Burrington charged, not only against the county, but the townships as well, for rebate, and made it a comparatively easy matter to check over his work and verify his credit entries.

"No statements giving memoranda of rebate transactions occurring during the terms of John Madill or Leslie Madill, are on file in the treasurer's office.

"The report of the audit of John Madill's term shows that no rebating was done by him prior to the several general rebate resolutions passed at the October, 1904, session of the board of supervisors, except in two or three instances under special resolutions to which he referred in

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taking his credit and the amount of said special credits are correct. Following the adoption of the several rebate resolutions in October, 1904, purchases were made and reported by the auditor general in the months of November and December, upon which the rebates amounted to $1,034.64 and application was actually made to Leslie D. Madill, deputy treasurer, in December, 1904, and the money paid to him for the purchase of certain lands in Lincoln township upon which the rebate amounted to $1,272.34; the application for the purchase of these lands was not made, however, by the county treasurer to the auditor general until January 25, 1905, but the resolution under which this purchase was made became void January 1, 1905. It was admitted by Mr. Madill under oath that it was his practice to compute the amount of rebate for the purchaser at the time the application was made to him and he therefore knew in December, 1904, what the rebate amounted to on the lands, the application for which, he for some reason, withheld until January 25, 1905. The treasurer would have no right to give rebate on these purchases if made after January 1, 1905, and the logical and safe course for him to follow would be for him to take credit for the amount of this rebate on December 31, 1904, which the accountant says he did do according to the records. The credit taken by L. D. Madill for John Madill on December 31, 1904, was $2,368.00 and in drafting the report of the committee on settlement with the county treasurer, the written part of which is in Leslie D. Madill's handwriting and the balance typewritten, reference is made to this credit as 'Rebate of ninety per cent. of the county taxes as per resolutions of the board of supervisors, October, 1904.'

"The total rebate on lands reported as sold by the auditor general in November and December, 1904, and those reported in January and February, 1905, but for which an application was actually made to the county treasurer in December, 1904, under a resolution becoming void January 1, 1905, amounted to $2,306.98. Mr. Madill before the audit committee on February 7, claimed that he was entitled in his term, commencing January 1, 1905, for the rebate on the purchases just mentioned as having been applied for to the auditor general on January 25, 1905, under the resolution becoming void January 1, 1905, and claimed that the deficit which would then be made in his father's credit was made up by rebate to Will E. Reardon, W. D.

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Gordon, Gardner & O'Dell and William Timmons, for purchases made by them in April and May, 1904, under a rebate resolution dated January 20, 1899, and under which no rebating had been done for years, and claimed credit for his father for drain at large which he claimed had always been by him rebated as a county tax, and claimed credit for rebating certain drain special to N. A. Bentley and Winslow Inman amounting to $65.15, also which he claimed he rebated as county tax. Upon computing the amount of rebate claimed as extra credit by L. D. Madill for John Madill to make up the deficit caused by taking out of the December 31, 1904, credit the rebate above mentioned of $1,272.34 in order to have credit for that amount himself, it is found that these extra credits will, if considered, fall hundreds of dollars short of making up this $1,272.00.

"At a meeting Tuesday night, Mr. Madill appeared with counsel, and, upon the advice of his counsel, refused to make any statement. Accountant Winke was sworn as a witness at the request of counsel for Mr. Madill, and from the questions asked by counsel and Mr. Lane, I believe Mr. Madill is going to alter his sworn testimony of February 7, and claim other rebating to have been done by him for his father prior to 1904, but the nature and extent of this claim I have been unable to learn.

"The following is a comparison year by year of the credits taken and the amount that should have been taken as shown by the accountant's report:

Year	Amounts Entitled to	Credits Taken
1904	$2,413 76	$2,473 27
1905	8,050 96	8,088 02
1906	1,891 22	1,935 14
1907	2,274 39	2,225 34
1908	1,666 46	1,556 13
	$11,296 79	$11,277 90
December 31, 1908, Extra credit taken by ex-Treasurer L. D. Madill and claimed by him before the audit committee to be a balance for which credit should have been taken in the several credits previously taken during the above five years		2,958 63
		$14,236 53

"(This included the $1,272.34).

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"Mr. Madill had taken credit on June 30, 1908, for $1,556.13 and testified that he had on that date taken credit for every cent he believed he was entitled to up to that time, and that each time he took credit upon his books, he took all the credit to which he believed he was entitled.

"There was comparatively few sales in 1908, after this June credit was taken and Mr. Madill attempts to justify his taking of the credit for $2,958.63 on December 31, 1908, by saying that at the close of his term in December, 1908, he checked over the rebate transactions and found that he had cheated himself out of approximately $2,900.00 in computing the rebate credits.

"The accountant in making this audit construed the rebate resolutions to include no drain taxes, 'for reasons: (1) No special taxes, drain or otherwise, are specified in the resolution.' (2) 'A comparison of the audit figures with the credits taken in the aggregate or otherwise, for all the years covered in both periods shows the credit entries made, up to but not including the last entry in the five year period, to be practically correct without drain taxes.'

"In this connection it may be stated here that not only do the resolutions fail to specify drain taxes, but the board of supervisors' construction of its resolutions practically defining the same to include the county taxes only, as set forth above, is upon the records.

"Drain taxes are clearly special taxes and the board of supervisors have no more to do with the raising of the drain tax than they have to do with the township taxes and they are reported by the auditor general under head of 'Other Taxes.' Yet Mr. Madill claimed before the committee that he was entitled to credit for all drain at large prior to 1903 tax—since then drain at large has been expressly considered as a township tax—and claimed to have rebated the following special drain:

1905	Year's Tax	Tax	Interest
March—Wm. Young, nw ¼ nw ¼ 25, 16 n 1 e.	1888,	$66 40	$127 49
July—M. Rider, s ½ ne ¼ 12, 14 n 1 w.	1904,	66 00	3 30
June—F. G. Kneeland, s ½ sw ¼ 16, 14 n 1 e.	1904,	24 00	96
April—F. E. Winchell, w ½ ne ¼ 8, 13 n 2 e.	1904,	16 00	51

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1905	Year's Tax	Tax	Interest
April—F. E. Winchell, sw ¼ of ne ¼ 8, 13 n 2 e.	1903,	$18 00	$2 52
July—Ed. L. Brown, e ½ nw ¼ 25, 16 n 1 w.		50 75	20 81
July—Ed. L. Brown, s ½ ne ¼ 25, 16 n 1 w		79 75	32 70
		$321 53	$188 29
1906—None.			
1907			
May—Wm. E. Crane, n ½ of ne ¼ 30, 16 n 2 e.	1905,	54 50	9 10
May—Wm. E. Crane, n ½ of ne ¼ 30, 16 n 2 e.	1899,	48 00	41 76
May—F. G. Kneeland, nw ¼ 32, 14 n 2 w.	1906,	14 40	58
		$116 90	$51 44
1908			
May—D. N. Maxwell, sec. 19, 15 n 1 w.	1906,	42 21	6 18
May—D. N. Maxwell, se ¼ sw ¼ 28, 15 n 1 w.	1895,	8 77	13 94
May—D. N. Maxwell, sec. 19, 15 n 1 w.	1904,	41 21	16 07
May—D. N. Maxwell, sec. 19, 15 n 1 w.	1904,	41 21	11 13
		$132 40	$47 32

"Relative to the above claims for rebated drain taxes, I will say that he was not authorized by any resolution to make such rebates, and he recognized that fact by claiming to have only rebated the drain special on some occasions and not as the general rule. Not only did he have no authority to rebate the drain tax, but I have personal knowledge of the falsity of his claim in many instances and will produce the proof.

"If Mr. Madill were to be given credit for all claim that he has made to date to the audit committee he would still be short several hundreds of dollars in his accounts.

"In taking the credit of $2,958.63 on December 31, 1908, which the accountant says he had no authority to take, but which Mr. Madill attempts to justify largely by claiming that on reauditing his books he found about this amount of mistake, it is a significant fact that Mr. Madill

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admitted under oath that in addition to taking this large credit he was even then obliged to borrow money to settle up with his successor, Mr. Erwin.

"In making this statement, I have been conservative and stand ready at any time to answer any criticism that may be made."

For this publication plaintiff has brought this action, charging defendant with libel. The case was transferred to the circuit court of Bay county, and upon the trial before a jury and under the charge of the court a verdict of $500 was awarded the plaintiff. The defendant moved for a new trial, and assigned error. The motion was overruled by the court and opinion filed. The defendant excepted to the findings of the court and assigned error.

The assignments of error which we shall have occasion to consider relate to the charge of the court, and certain refusals to charge. In his charge to the jury the court used the following language:

"Now, gentlemen of the jury, I have come to the conclusion that it is my duty to submit to you the question as to whether or not either of these charges amounted to a charge of embezzlement. And the reason for that I will give you. Now, if the word 'embezzlement' had been used, or 'criminal shortage' had been used, I could say upon a reading of the article that this was a charge of embezzlement as a matter of law, and could instruct you that embezzlement was charged; but the article does not contain those words, and I am unable to say that the article as a matter of law in these respects charges embezzlement, and upon that point I charge you now, and shall not repeat that charge, although what I shall say later will refer to it and may refer to it more than once. I charge you now this: That if the expression which I first read, 'If Mr. Madill were to be given credit for all claims that he has made to date to the final audit committee he would still be short several hundred dollars in his accounts,' in connection with the other part of the article would indicate fairly, and reasonably indicate and show to those who read that article, to the readers of it, to the public generally, that the article did charge Mr. Madill with being criminally short, or charged him with being an embezzler, if you find that to be so, why, then, the

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charge of embezzlement—then the article means a charge of embezzlement. Similarly, referring to the statement which I have read: 'In taking credit for $2,958.63 on December 31, 1908, which the accountant says he had no authority to take, but which Mr. Madill attempts to justify largely by claiming that on reauditing his books he found this amount of credit, it is a significant fact that Mr. Madill admitted under oath that, in addition to taking this large credit, he was even then obliged to borrow money to settle up with his successor, Mr. Erwin'—I say taking that statement in connection with the other statements in the article, if it satisfies you, that as read by the people of Midland county at large they would reasonably and naturally draw the inference that embezzlement was thereby intended to be charged, you will treat the article as charging the offense of embezzlement."

Also the following:

("The defendant in this case was not privileged to charge the plaintiff in this case, Mr. Madill, with embezzlement. That is not one of the things that privilege protects against, and the result of that is this: That, if you find under the instruction I have given you that the defendant in that article charged Mr. Madill with a crime, then the burden of proof is upon the defendant, Currie, to prove the truth of the charge. The burden of proof is not upon the plaintiff to prove that it is not true, but the burden of proof is upon the defendant, Currie, if that charges a crime, to prove that the charge is true as a defense. On the other hand, as to the statements in the article other than the two which I have read to you in your hearing, I think that the defendant is entitled to the protection and benefit of a privilege as to what was said, and before they can be considered as libelous, before you can treat them as libelous, it must be established that all of the allegations complained of in the article other than the two which I have referred to—that is, to those articles, the plaintiff cannot treat them as libelous, and you will not consider as libelous, unless plaintiff proves that they are not true. To restate it, as to the statements in the articles imputing a crime to Mr. Madill, the burden of proof is upon the defendant, Currie, to prove these articles are true, as a protection to himself on that account. As to the statements in the article not imputing a crime to the defendant, Currie [plaintiff Madill], as to those articles be-

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fore they can be considered as libelous, the testimony must satisfy you by its greater weight, or, in other words, the burden of proof is on the plaintiff to show that these statements are not true."

And in addressing counsel during his charge the court said:

("You do not contend that if these privileged communications—statements that were untrue—they were still privileged?")

Upon the question of privilege the court further instructed the jury as follows:

("And I instruct you, as I think I have, already, that this was a privileged communication in view of all the circumstances; that is, that it was a privileged communication excepting those parts of it which the jury find charged Mr. Madill with having committed a crime.")

In regard to the credits claimed by the plaintiff for alleged rebating of drain taxes, the court further instructed the jury:

"Before he can be charged in any criminal sense, or in any criminal way, the jury must be satisfied beyond a reasonable doubt that he knowingly as well as unlawfully took such credits."

And the court also charged the jury:

"I rule that for the purpose of this case those drain taxes were not lawful credits, but, as before stated, that nothing of a criminal nature could be imputed to Mr. Madill in taking these credits, without it appears by the preponderance of proof that they were knowingly and unlawfully taken as credits."

The court refused to give defendant's ninth and fourteenth requests to charge, which read, respectively, as follows:

"I further charge you and instruct you that in this case, from all the surrounding circumstances, considering the defendant's position as chairman of the committee in question appointed by the board of supervisors of the county, and considering the circumstances wherein he attempted to procure a report from the committee and

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failed, that the article published by him on March 11th, and complained of by the plaintiff, is a privileged communication, and, if it was made in good faith by him, the plaintiff cannot recover in this case."

"I further instruct you in this connection that it does not make any difference as to whether the statements in the articles were true, or false, if they were made with an honest belief that the same were true, and were made without malice upon the part of the defendant, because the nature of his position was such that he had a right to make the statement, if he believed it to be true, to the public."

This brings us to the consideration of the second, third, and fourth assignments of error, which begin with that portion of the charge beginning with the words, "The defendant in this case was not privileged," etc., and including the matter embraced in the parentheses in the charge.

A perusal of this and other portions of the charge indicate clearly that the court repeatedly instructed the jury that the defendant could not be privileged in imputing to the plaintiff the commission of a crime. This we do not understand is the law in this State. See *Bacon* v. *Railroad Co.*, 66 Mich. 169–171 (33 N. W. 181); *Schultz* v. *Guldenstein*, 144 Mich. 636–641 (108 N. W. 96), and cases there cited, holding that the occasion determines the privilege.

It seems to have been the view of the learned circuit judge that the language used in the article, and not the occasion of its use, would determine the question of privilege. We think there was error in this portion of the charge. The court in denying the motion for a new trial seeks to excuse this portion of the charge by stating that there was neither an occasion of privilege nor a privileged communication involved in the case, and that, therefore, the error, if any, was harmless. We cannot agree with this position. We do not think it can be successfully claimed that this defendant, chairman of an investigating committee, whose appointment by the supervisors was instigated by the petition of seven hundred and seventy

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electors of the county, in publishing this report to them of a matter of such public concern, should be placed upon the same footing as a libeler publishing some private gossip, scandal, or personal abuse, and, as we shall hereafter more fully state, we think the defendant was entitled at least to the benefit of the rule of qualified privilege. For the learned circuit judge frequently during his charge to direct the attention of the jury to certain portions of defendant's statement or report, and tell them each time in effect that no accusation or crime could be privileged, not only constituted an erroneous statement of the law, but, in its very nature, must necessarily have impressed the jury that there was something in those statements to which the court wanted them to give special attention, and the natural result of their being told so emphatically and often that such accusations could not be privileged would probably, as it did in this case, result disastrously to the defendant.

The sixth assignment of error relates to that portion of the charge above quoted, as follows:

"Before he can be charged in any criminal sense, or in any criminal way, the jury must be satisfied beyond a reasonable doubt that he knowingly as well as unlawfully took such credits."

This we do not understand to be an accurate statement of the law. If the burden of proof was upon the defendant in this case, and crime is charged, defendant is required to show plaintiff guilty by a preponderance of evidence only, and not beyond a reasonable doubt. *Peoples* v. *Evening News Ass'n*, 51 Mich. 11–17 (16 N. W. 185, 691); *Owen* v. *Dewey*, 107 Mich. 67–73 (65 N. W. 8).

The erroneous statement was in no place corrected by the learned trial judge, although he did in another instance charge as follows:

"I rule that for the purpose of this case those drain taxes were not lawful credits, but, as before stated, that nothing of a criminal nature could be imputed to Mr. Madill in taking these credits, without it appears by the pre-

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ponderance of proof that they were knowingly and unlawfully taken as credits."

We do not think it can be logically contended that this last statement would correct the former erroneous statement. Upon this subject this court said:

"When conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous, and the verdict will be reversed." *Grand Rapids, etc., R. Co.* v. *Monroe*, 47 Mich. 152–154 (10 N. W. 179).

Even the use of the words "clear preponderance" under some circumstances has been held reversible error. *Hoffman* v. *Loud*, 111 Mich. 156 (69 N. W. 231); *J. H. Worden Lumber & Shingle Co.* v. *Railway Co.*, *ante*, 74 (133 N. W. 949).

The tenth and eleventh assignments of error complain of the refusal of the court to charge the jury as requested in defendant's ninth and fourteenth requests to charge, above set forth. A certified public accountant had audited the plaintiff's books and found a shortage of about $2,900. He also found, and this fact is admitted by plaintiff, that no records or memoranda had been kept by plaintiff to show upon what descriptions, or to what persons rebate had been given. The accountant had requested a committee meeting which was held on February 7, 1910, at which the accountant made known the finding of his audit. The plaintiff endeavored, under oath, to explain the shortages shown, and his explanation involved the names of a considerable number of people to whom he claimed to have given rebates. The time for the committee to make its report had long since expired. The accountant had made and filed his report. The subject-matter was one of public concern and interest. If a shortage existed, the taxpayers of the county were interested in it, and must either recover it from the plaintiff or raise additional taxes upon themselves. Unless a special session were called the board of supervisors would not meet before the following October, but the annual election of

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supervisors would occur within a month. It is undisputed that the defendant requested the other members to join with him and report their doings. This the other members neglected at least to do. If the committee had joined in making this report, without a question it would have been absolutely privileged under the decisions of this court. *Trebilcock* v. *Anderson*, 117 Mich. 39 (75 N. W. 129); *Wachsmuth* v. *National Bank*, 96 Mich. 426 (56 N. W. 9, 21 L. R. A. 278).

Under all the circumstances of this case, considering that the defendant was legally appointed and was serving as chairman of the committee to investigate plaintiff's accounts, and that an accountant hired to audit these accounts found a shortage, as above stated, by reason of a credit taken on the last day plaintiff was in office, the fact of the failure to keep books to show the truth of the matter in dispute certainly furnished some reason why the public should be apprised of the condition of plaintiff's accounts and the claims advanced by him. We cannot say that the defendant was not endeavoring to perform a duty he owed to the public to make known to them what the accountant had found in relation to the plaintiff's accounts, and the progress made to that date by the audit committee.

It is contended that defendant should have filed his report with the county clerk. Does that fact destroy the privilege? We think not. Although his appointment came from the board, defendant's duty was to represent, and perform a public service for, the citizens and electors of Midland county who were interested in the subject-matter. Upon this subject, see Newell on Slander and Libel, §§ 96, 98, at page 500, § 101 at page 504; *Howland* v. *Flood*, 160 Mass. 509 (36 N. E. 482). In *Bradley* v. *Heath*, 12 Pick. (Mass.) 163 (22 Am. Dec. 418), Chief Justice Shaw said:

"Where words imputing misconduct to another are spoken by one having a duty to perform, and the words

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are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith, to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words; and therefore no action can be maintained in such cases, without proof of express malice."

Qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. *Bacon* v. *Railroad Co.*, 66 Mich. 166 (33 N. W. 181); *Trimble* v. *Morrish*, 152 Mich. 624 (116 N. W. 451, 16 L. R. A. [N. S.] 1017); *Flynn* v. *Boglarsky*, 164 Mich. 513 (129 N. W. 674, 32 L. R. A. [N. S.] 740). The distinction between the last-cited case and the instant case is very clear. In the *Flynn Case* the subject-matter was not such as to concern the welfare of the public generally, but in the case at bar the subject-matter was of the utmost interest and concern to the electors of Midland county, to whom the communication was addressed, and we cannot say that the course pursued was not the only feasible and effective manner of reaching them. Years ago this court held that the publication of a report of matters of public interest is privileged, and not actionable unless express malice is proved. See the language of Judge COOLEY in *Miner* v. *Tribune Co.*, 49 Mich. 358 (13 N. W. 773). The careful examination of this record satisfies us that the defendant was at least entitled to the benefit of a qualified privilege, and that the court erred in failing to so instruct the jury, and that such error was prejudicial goes without saying.

Other errors discussed are not likely to occur upon a new trial in view of what we have already said.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial granted.

STEERE, MCALVAY, BLAIR, and OSTRANDER, JJ., concurred.

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WESTON v. DUNN.

1. APPEAL AND ERROR — SPECIFIC ASSIGNMENT — SAVING QUESTIONS FOR REVIEW—DIRECTING VERDICT.

   In assigning error by setting out the charge of the court which contained conclusions of fact as well as of law and directed a verdict for plaintiff, the defendant's objection that the court erred in so instructing the jury, was not sufficiently specific.

2. BOUNDARIES—NAVIGABLE WATERS—GREAT LAKES—ACCRETIONS TO REAL PROPERTY.

   Where several lots described by number in the government survey lay contiguous to a channel of one of the Great Lakes, and fronted upon the water, which by receding left accretions not divided by the survey among the several lots, and by the recession of the water plaintiff's lot became separated from the water line so that the meridian line constituting the section line east of his lot passed between the plaintiff's premises and the shore, leaving the new land adjacent to a lot on another section and range, it could not be held, as a matter of law, that plaintiff acquired no rights by accretion beyond the meridian line, in the adjoining section and range.

3. SAME—TRESPASS.

   Having possession of the disputed land, the plaintiff was entitled to maintain trespass against defendant who tore down a fence, and entered the close without being able to show title to the premises.

Error to Mackinac; Shepherd, J. Submitted November 13, 1911. (Docket No. 94.) Decided March 12, 1912.

Trespass *quare clausum fregit* in justice's court by Charles Weston against David C. Dunn and others. The justice certified the case to the circuit court on the ground that the title to land was involved. Judgment for plaintiff on a verdict directed by the court. Defendants bring error. Affirmed.

Henry Hoffman, for appellants.

James J. Brown, for appellee.

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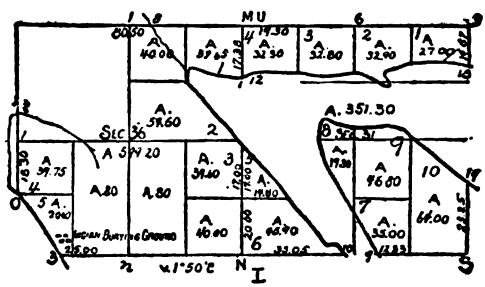
OSTRANDER, J. The action was begun in justice's court, where plaintiff declared, describing, or attempting to describe, the land trespassed upon by defendants. Defendants pleaded the general issue and gave notice that on the trial they would show that the close in plaintiff's declaration mentioned and in which the injuries complained of were supposed to have been committed is, and at the time of the alleged trespass was, the close and freehold of defendants' licensor, and that what was done upon the land was by permission of the owner. Thereupon the cause was certified to the circuit court for trial. Coming on to be tried, plaintiff offered testimony tending to prove his title to lot 2 in section 36, town 42 north, of range 1 west, in Mackinac county, being a part of the south half of the northeast quarter of said section, and his possession of the land since the year 1884. The government plat and original field notes, which were produced, and are here reproduced, show a meandered water front on the easterly boundary of said lot, and that no part of said lot was bounded by the meridian line:



The person, in whose right defendants entered, owned, it was conceded, lot 5, in section 31, in the township next east of the land in dispute; said lot being bounded on the west by the meridian line. The parcel of land in dispute has been formed by accretion or by receding waters and lies east of the meridian line and north of the quarter line in section 36, directly north of lot 5 if lot 5 is extended north to the said quarter line. Lot 3, as originally sur-

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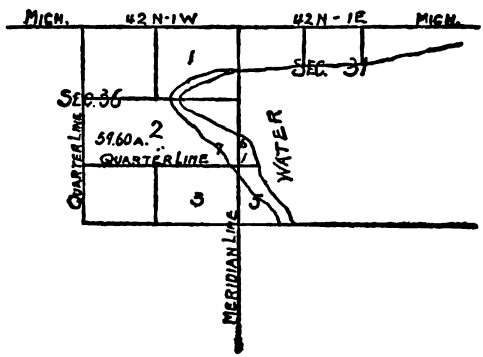
veyed, does not now touch the water and belongs to neither plaintiff nor defendants' licensor. There is now a road on the meridian line. Plaintiff's testimony tended to prove, also, that he built a fence near the quarter line east of the meridian line, a distance of some 30 rods, to the water, cutting off access to his land by cattle from said lot 5. Later he built a fence on the east side of the meridian line road, on the west line of the land in dispute, and it is this fence which defendants tore down sufficiently to drive upon the land in dispute. This is the trespass complained about. Another drawing, known as "Exhibit 2," was introduced, and is here reproduced:



On it the triangular piece of land in dispute is marked "1." The water line formerly, indicated by "7," is now shown by the line "6." As stated to the trial court, plaintiff's position is:

"That when plaintiff homesteaded said lot 2 in 1884, and also when he received his patent therefor in 1891, the disputed triangular piece of land was covered with water; that it has since become derelict land by the gradual and imperceptible recession of the water from lots 2 and 3 and 5; that no portion of the land, where the trespass is claimed to have been committed, belongs to lot 5, but to lot 2, section 36, town 42 north, of range 2 west, Mich.; that the principles which govern riparian rights give plaintiff title to the derelict land in dispute, notwithstanding it lies east of the section line running north and south between section 31, town 42 north, of range 1 east, and section 36, town

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42 north, of range 1 west; that, at all events, if plaintiff has no title, defendants have none, and plaintiff, being in peaceable possession at the time of the alleged trespass, can recover."

Counsel for defendants made to the trial court the following statement:

"We admit that plaintiff owns the premises claimed by him in section 36, town 42 north, of range 1 west, Mich., and that in his patent the premises are described as claimed by Mr. Brown, and we also admit that plaintiff was in possession of this triangular piece, marked '1' on Exhibit 2, at the time of the alleged trespass; but our claim is that this triangular piece, marked lot '1' on Exhibit 2, belongs to and is a part of lot 5, section 31, town 42 north, of range 1 east, Mich., and is owned by Lydia J. Dunn, wife of defendant David C. Dunn, and that defendants had a right to enter upon said premises, or said triangular piece of land, as agents of said Lydia J. Dunn. And we also claim that if this triangular piece, marked on Exhibit 2 as 'lot 1,' is not a part of lot 5, section 31, town 42 north, of range 1 east, Mich., then the plaintiff is not entitled to recover in this action. My contention is that the legal subdivision of lot 2, section 36, town 42 north, of range 1 west, Mich., cannot extend east and past the principal meridian, and that the triangular piece marked '1' on Exhibit 2, being attached to lot 5 of section 31, is a part of lot 5. It is admitted by the parties hereto that at the time of the homesteading by plaintiff of the land in question, the water line was at line 7 on Exhibit 2, and east of that line was water and west of it was land, and that now the water line is at line marked figure 6, and west of that line is land and east of it is water. It is also admitted that this triangular piece of land, by accretion, must either belong to lots 2 and 3, section 36, town 42 north, of range 1 west, or lot 5, section 31, town 42 north, of range 1 east, Mich."

The character of the channel, the distance to the nearest island, is not made to appear. Again, counsel for defendants said, referring, apparently, to the description of lot 5, in his paper title (which does not appear in the record):

"It does not say lot 5 in the northeast one-quarter of the southwest one-quarter. It says lot 5 in section 31. It

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is not confined by any boundaries at all. Lot 2 of section 36 cannot go outside of the section."

The court overruled defendants' contention, instructed the jury that plaintiff was in possession of the premises, and further said:

"The court is somewhat uncertain as to whether the plaintiff owned all of them. He did, in my opinion, own the greater part, if not all, of the triangular piece of land. At any rate, they were not owned by the defendants or any one whom the defendants represented; and therefore they were guilty of trespass in going upon the land."

A verdict was directed for plaintiff for nominal damages. We find in the record no evidence that any question was debated or any point raised by defendants, except the one hereinbefore indicated. It does not appear that defendants preferred any requests to charge. No exceptions were taken to rulings.

In assigning error defendants set out the charge of the court at length with the statement that the court erred in so charging the jury. As the charge or statement made by the court to the jury contains conclusions of fact as well as of law, the assignment is not specific. In the brief in this court the charge is said to be erroneous because:

(1) The declaration does not describe any particular piece of land.

(2) The only trespass declared for is cutting and carrying away growing grass, and the only trespass proved is tearing down a fence, etc.

(3) "The water shown on Exhibits 1 and 2 is a part of Lake Huron, being one of the channels in the Les Cheneaux Islands, Mackinac county, Mich. The trespass, as shown by the testimony of plaintiff, is the tearing down of a fence near the quarter line in section 31, and on the east side of the meridian road near the quarter line, but how far from the quarter line, and how far from the meridian, the evidence fails to state. The record is entirely bare of any testimony tending to show whether the waters shown on Exhibit 1 are navigable or not, and whether there is any *filum aquæ*, or middle thread, in the channel shown on Exhibit 1, and if any such middle thread, where

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the same is, in order that some rule of proportion might be adopted which would give each landowner along the shore his proportionate share of the shore or accretion formed adjacent to the shore in sections 31 and 36. In this respect, testimony fails to show that the point where the trespass was committed would fall outside of the boundaries of lot 5, section 31, town 42 north, of range 1 east, Mich., when lot 5 has been given its just proportion of its share of the accretion in sections 31 and 36, as shown by Exhibits 1 and 2, and the court erred in directing a verdict in favor of the plaintiff, and a verdict on the court's own motion should have been directed for the defendants."

Considering the assignment as amounting, in effect, to an averment that it was error for the court to direct a verdict for plaintiff, and that a verdict should have been directed for defendants for the reason that plaintiff could claim no accretions to his land beyond the meridian line, and that as matter of law the accretion in question is a part of lot 5, we think it without merit.

The admission that plaintiff was in possession of the invaded close disposes of the contention, unless the land in question is a part of lot 5. The only authority referred to by counsel for defendants, which is *Grand Rapids Ice & Coal Co.* v. *Coal Co.*, 102 Mich. 227 (60 N. W. 681, 25 L. R. A. 815, 47 Am. St. Rep. 516), does not determine the point, having, apparently, no application to the case of lands bordering waters of the Great Lakes. If the rule stated and applied in *Blodgett & Davis Lumber Co.* v. *Peters*, 87 Mich. 498 (49 N. W. 917, 24 Am. St. Rep. 175), is followed, it would seem that the owner of lot 3 should not be excluded from access to the water, and, if not excluded, it is plain that the owner of lot 5 has no title to the land in question. We are not advised by counsel concerning the proper rule to be applied.

The judgment is affirmed.

MCALVAY, BROOKE, and STONE, JJ., concurred. BLAIR, J., concurred in the result.

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RAMEAU v. VALLEY.

1. APPEAL AND ERROR — TRIAL WITHOUT JURY — EXCEPTIONS — SAVING QUESTIONS FOR REVIEW.
   In order to review a finding of facts and law made by the circuit judge sitting without a jury, appellant should file exceptions within four days unless further time is granted; and such exceptions should be settled and incorporated in the bill of exceptions. Circuit Court Rule 26.

2. JUSTICES OF THE PEACE—ATTACHMENT—SERVICE OF PROCESS—INVENTORY.
   Judgment in justice's court against a defendant in attachment served with the summons but not with the writ of attachment or a copy of the inventory is invalid. 1 Comp. Laws, § 730.

3. CHATTEL MORTGAGES—AFFIDAVIT—SUBSCRIPTION.
   An affidavit attached to a chattel mortgage, sworn to but not subscribed is sufficient. Act No. 332, Pub. Acts 1907.

4. REPLEVIN—DEMAND—EXCUSE.
   Defendant unlawfully in possession of property under a void execution may not defend against an action of replevin on the ground that no demand was made, where it appeared that he would have refused the demand in any event.

Error to Muskegon; Sessions, J. Submitted November 15, 1911. (Docket No. 124.) Decided March 12, 1912.

Replevin in justice's court by William Rameau against Edward F. Valley and Ralph Peterson. From a judgment for plaintiff, defendants appealed to the circuit court where judgment for nominal damages was entered against defendant Peterson, and as to defendant Valley judgment of no cause of action was entered. Defendants bring error. Affirmed.

Turner & Turner, for appellants.

Alex Sutherland, for appellee.

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McALVAY, J. This was a replevin case commenced in justice's court by plaintiff against defendants to obtain possession of a certain ferry scow and cable used to ferry across the Muskegon river, in Muskegon county, where a bridge had formerly been located. From a judgment rendered in justice's court an appeal was taken to the Muskegon circuit court, where the case was tried before the court without a jury.

The following findings of fact and conclusions of law in the case were made and filed by the court April 18, 1910:

"Findings of Fact and Law.

"(1) That the defendant, Edward Valley, commenced an action in justice's court against one Antone Fritz on the 3d day of June, 1908.

"(2) That a writ of attachment and a summons in the ordinary form was issued upon that date returnable upon the 13th of June, 1908. Directed to Antone Fritz the defendant in that cause.

"(3) The return of the officer on the summons shows that it was personally served upon Antone Fritz, but the return of the writ of attachment does not show personal service on Antone Fritz of the writ of attachment or copy of the inventory.

"(4) That the property which is in controversy in this replevin suit was attached by the defendant Peterson upon said writ of attachment. That the defendant Peterson was the deputy sheriff who served the writ of attachment, but failed to serve a copy of the inventory of the property seized by virtue of said writ of attachment.

"(5) That Antone Fritz did not appear before the justice on the return day of the writ of attachment and summons, and judgment was taken against him.

"(6) The case in justice's court was carried on as an attachment suit, and was so styled in his docket, and the justice and the parties regarded it as an attachment suit, and they supposed the justice acquired jurisdiction of the case by virtue of his seizure of the property under the writ of attachment.

"(7) That on the 24th day of June, 1908, an execution was issued by the justice and levied upon the attached property by the defendant Peterson, deputy sheriff.

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"(8) That on the 13th day of June, 1908, Antone Fritz gave a chattel mortgage to William Rameau for fifty (50) dollars to secure him for his indorsement of Mr. Fritz's note, which had been given to one Robert Kempf. The note and debt was not then due. This chattel mortgage had a statutory affidavit attached. The affidavit was sworn to by Mr. Fritz, but he did not sign it.

"(9) This chattel mortgage covered the same property which had been attached, and it was duly filed the day it was dated in the office of the township clerk in the township where this property was situated.

"(10) That on the 3d day of July, 1908, this replevin suit was commenced by the plaintiff against the defendants to recover possession of the property which was then in the possession of the defendant Peterson, deputy sheriff.

"(11) That the defendant Valley was never in possession of the property described in the replevin suit.

"(12) That the plaintiff Rameau did not make a demand on the defendant Peterson for the possession of the property, before the replevin suit was instituted."

"(14) That this replevin suit was commenced before Benjamin G. Oosterbaan, a justice of the peace for the city of Muskegon, Mich., and a judgment in favor of the plaintiff was appealed to this court by the defendants."

Upon these facts the court reaches the following conclusions of law:

"(1) That the justice acquired no jurisdiction of the attachment suit because of the failure of the deputy sheriff to serve a copy of the inventory upon Mr. Fritz, the defendant.

"(2) That there could be no judgment rendered upon the summons, and, even if there was, the chattel mortgage would take precedence over the execution and the lien created thereby.

"(3) That no demand was necessary because the defendant Peterson was a trespasser, and because a demand would have been ineffectual and would have accomplished nothing.

"(4) The affidavit attached to the chattel mortgage was sufficient, though it was not signed.

"(5) That the plaintiff is entitled to a judgment against the defendant Peterson for six (6) cents damages.

"(6) That the defendant Valley is entitled to a judgment of no cause of action.

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"(7) That as this is an appeal case from justice's court, under the circumstances of this case, neither party should recover costs."

Upon these findings a judgment was later entered in favor of the plaintiff, and against defendant Peterson, for the sum of six cents damages, and against plaintiff in favor of defendant Valley. No costs were allowed to either party. Defendants have brought the case to this court for review upon writ of error. Defendants were apparently satisfied that the findings were sufficiently full and definite, as no amendments to them were proposed.

On April 26, 1910, they filed exceptions to the conclusions of fact and law found by the court, although no time for that purpose had been extended or allowed by the court. Such claimed exceptions were not settled and incorporated in the bill of exceptions. An examination of Circuit Court Rule 26, the provisions of which appellee contends have been disregarded by appellants, shows the practice which must be followed by a party desiring to review errors claimed to have been made by the trial court in the facts found by him and his conclusions of the law thereon.

In the instant case it appears that the requirements of this rule have not been followed in the following particulars:

(1) Such exceptions were not filed within the four days required, and no extension of time was granted.
(2) They were not settled and incorporated in the bill of exceptions.

It follows that the only question before this court is whether the findings of fact support the judgment. *Stafford* v. *Crawford*, 118 Mich. 285 (76 N. W. 496); *Goulet* v. *Perry*, 123 Mich. 264 (81 N. W. 1072). From the facts found by the court his conclusions of law were:

(*a*) That the attachment proceedings were invalid.
(*b*) That the chattel mortgage was valid against the defendant.
(*c*) That no demand for the property was necessary.

These three propositions will be briefly considered.

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1. The court upon ample evidence found that this was an attachment case in which judgment was rendered, upon which the execution was issued under which the defendant Peterson held the property, also that the defendant did not appear in the case, and that no certified copy of the inventory in attachment was served upon defendant. The conclusion of law that the judgment was invalid was correct. *Langtry* v. *Wayne Circuit Judges*, 68 Mich. 451 (36 N. W. 211, 13 Am. St. Rep. 352); *Davison* v. *Davison*, 99 Mich. 625 (58 N. W. 637); *Cary* v. *Everett*, 107 Mich. 654 (65 N. W. 566).

2. The material objection by defendants to the chattel mortgage was that it had no affidavit attached (Act No. 332, Pub. Acts 1907), in that, although sworn to, it was not signed by affiant. This court has repeatedly held that such an affidavit is valid. *Wynkoop* v. *Grand Traverse Circuit Judge*, 113 Mich. 381 (71 N. W. 640), and cases cited.

3. Defendant was in possession of the property under a void execution. He knew of the mortgage of plaintiff and his acts in relation to the property at that time, and the notice under his plea in the same case clearly indicates that a demand would have been refused if it had been made. *Galvin* v. *Iron Works*, 81 Mich. 16 (45 N. W. 654).

The judgment of the circuit court is affirmed.

BROOKE, BLAIR, STONE, and OSTRANDER, JJ., concurred.

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UNION TRUST CO. *v.* ELECTRIC PARK AMUSEMENT CO.

1. FORECLOSURE—PRACTICE—NOTICE OF PROCEEDINGS.
   While notice of filing of a decree of foreclosure and of the steps taken to advertise and sell is required by the rules and practice of the court of chancery, a defendant who had actual notice in season of the sale and report of sale, and whose attorney attended the sale and filed exceptions to the commissioner's report, was not prejudiced by comp'ainant's omission to give formal notice.

2. SAME—DECREE—APPEAL AND ERROR—SUPREME COURT.
   Where a decree of foreclosure as filed in the Supreme Court required payment to be made to reinstate defendant under the mortgage on or before January 5th, but was not signed and filed until January 7th, the defendant who was allowed the statutory right to redeem within six months after sale, which did not take place for two months, could not complain.

3. SAME—TAXES—SURPLUS.
   Taxes paid by the complainant after decree and before sale were properly allowed to complainant, who bid in the premises for the amount due, including them.

4. SAME.
   As mortgagee complainant would be entitled to an equitable lien for such amounts, and to reimbursement out of any surplus arising from the sale of the premises.

5. SAME.
   A party relying on irregularities must complain promptly, or lose his right to relief.

Appeal from Wayne; Murfin, J. Submitted November 20, 1911. (Docket No. 62.) Decided March 12, 1912.

Bill by the Union Trust Company, trustee, against the Electric Park Amusement Company, Electric City Amusement Company, and Detroit Trust Company, trustee, for the foreclosure of a mortgage. From an order overruling their exceptions to the commissioners' reports of sale under a decree, defendants appeal. Affirmed.

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Russell, Campbell, Bulkley & Ledyard and *E. T. Berger*, for complainant.

Thomas A. E. Weadock, for defendants.

STEERE, J. This record presents two appeals taken by three of the defendants, the Electric Park Amusement Company, Electric City Amusement Company, and Detroit Trust Company, from orders of the Wayne county circuit court in chancery overruling defendants' exceptions to preliminary and final reports of the circuit court commissioner made on the sale of certain premises under a decree of foreclosure by this court. A former opinion in this suit, leading up to said decree, is reported in 163 Mich. 687 (130 N. W. 306). By that opinion all questions involved up to that time in the protracted litigation were adjudicated, except the matter of compensation for services of the trustee and its counsel. The lower court had made an allowance for such services in the sum of $3,500, without sufficient proof, as this court held. Upon that subject it was said:

"As stated in the opinion and as shown by the record, the court refused to permit the defendants to go into the details of the services, or to clearly separate those which were a proper charge in this suit from those which were not. Under such circumstances, we are constrained to remand the case for further proofs upon this subject. Upon hearing the further proofs, upon this subject alone, a decree may be entered by the circuit court in accordance with this opinion and the further finding of such court."

Said opinion was filed on July 14, 1910, following which complainant and its counsel filed in due form a written waiver of all claims for allowance of compensation and fees for services, in relation to which alone the case had been remanded for further proceedings, and also filed at the same time a written consent that final decree might be entered in this court according to the opinion rendered, making no allowance in such decree for fees or compensa-

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tion for services. In the meantime a motion for rehearing had been made by the defendants, heard, and denied on December 8, 1910. After these proceedings, steps were taken to obtain from this court a final decree disposing of the whole matter. On January 3, 1911, opposing counsel appeared before the justice who wrote the opinion, each presenting a draft of such form of decree as was desired and such as each side claimed to be entitled to under the opinion. On this hearing before the justice for settling a decree, defendants' counsel asked, among other things, 30 days' additional time for payment before sale. Complainant's counsel strenuously opposed this, contending that there had been constant delays at the instance of defendants, and the matter should now be speedily disposed of. The justice to whom this matter was presented, after hearing both parties, took copies of their proposed decrees, stating to them that on January 7, 1911, he would be able to confer with his associates, when a decree would be settled and handed down. This was done, and the decree was signed, entered, and recorded in this court, and became a public record on that date. It was certified from this court on January 10, 1911, and the record, remanded with said decree from this court, was filed with the clerk of the Wayne county court on January 13, 1911. On January 21, 1911, the case was enrolled at the instance of complainant.

The decree, after certain introductory matter, determined, in paragraphs 1 and 2, that the total amount due on the mortgage which was being foreclosed, including all interest, insurance, taxes, and other expenses up to that date, aggregated $100,961.33. Paragraph 3 of said decree provides in part as follows: That the defendant Electric Park Amusement Company shall pay to said complainant all of the sums mentioned in paragraphs 1 and 2 of the decree, with interest at the rate of 5 per cent. per annum, together with costs of the circuit court to be taxed, if not already taxed, "all of which payments shall be made on or before the 5th day of January, 1911,"

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in default whereof the premises shall be sold at public auction by the circuit court commissioner of Wayne county "at any time after the 7th day of January, 1911." Said section further provides that, after confirmation of the sale, the commissioner shall pay out of the proceeds the expenses of this suit in the court below and of said sale, "neither party to recover costs in this court." He is also required to pay all taxes, insurance, assessments, liens, and expenses, with interest thereon, and the principal and interest of the bonds outstanding under the mortgage, amounting to $95,134.48, and "any surplus remaining after the payment of the foregoing sums shall be distributed according to the further order of this court." Section 8 of said decree provides for reinstatement of the defendant amusement company under the mortgage on payment to the complainant of $20,961.33, with interest from the date of the decree, being the stipulated amount found due at the time of the decree according to the terms of the mortgage, had the total sum not been declared due by reason of default in the payment of an installment, "together with any taxes, assessments, rates, charges, labor or mechanics' liens, which may be levied or imposed upon said property, which were due and unpaid at the date of the payment, or which may have been paid by the complainant, together with interest on such paid taxes, assessments, rates, charges," etc., at the rate of 5 per cent. per annum, "and upon such payment and performance the trustee shall discontinue this suit and all proceedings taken hereunder." The decree contains the usual statutory six months' time in which to redeem after sale and all other formal matters usually found in a decree of foreclosure.

Pursuant to the terms of said decree, the commissioner proceeded to advertise and sell the property covered by the mortgage. The first publication of foreclosure sale appeared in the Detroit Legal News on January 21, 1911, and the sale took place on March 7, 1911. Notice of tax-

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ation of costs was served on defendants' solicitor March 6, 1911. Preliminary and final reports of the sale were filed by the commissioner, the latter on April 5, 1911, and exceptions to the same were filed by defendants. These exceptions were argued and overruled and the reports confirmed by the Wayne circuit court in chancery, from which orders this appeal was taken. At the sale the Union Trust Company, trustee, was the only bidder, and the property was struck off to it for $104,903.56, being the amount due by the decree, including $3,027.66 for taxes which complainant paid before sale, but after decree. No formal notice was given defendants' solicitor of filing said decree, or of the steps taken to advertise and sell. In those respects certain of the proceedings do not strictly comply with the rules, but the record shows he had actual notice, and was fully advised, thereof in ample time to have taken any steps necessary to protect defendants' rights.

The first published notice of sale was seen by him two days after its issue. He was served with notice of taxation of costs before sale. A person from his office attended the sale and took memoranda thereof. He was notified of the commissioner's report of sale, and filed exceptions thereto.

Complaint is made of a palpable clerical error in dates found in the decree, wherein it reads that payment is required to be made on or before January 5th, the decree being signed on January 7th. The hearing for settlement of decree was on January 3d, and apparently it was the intention, reckoning from then, to give two days' time, but the decree not being signed until the 7th, an error in copying, or omission to advance the date, resulted in the inconsistency. According to his own affidavit, this was discovered by the defendants' solicitor on January 23, 1911. Good faith with the court would suggest calling attention to this when discovered, but the worst that can be said of it is that no time for payment before default was specified. We think the decree valid without specifically fixing any date for redemption in the portion of the decree mentioned.

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The present statute gives right to redeem within six months after sale. The provisions of paragraph 8 of the decree, heretofore referred to, expressly provided that defendants, at any time before the date set for sale of the premises, might, by paying installments in default, and costs, be reinstated under the mortgage, whereupon complainant would be compelled to discontinue this suit, and dismiss all proceedings.

The sale did not take place until two months after the decree was settled. Defendants, whose solicitor participated in settlement of said decree, had two months thereafter to pay up installments and be reinstated before sale, and eight months in which to redeem. Defendants had ample notice and time to redeem. *Redfield* v. *Reid*, 148 Mich. 545 (112 N. W. 124).

Exception was taken to the final report of sale and confirmation thereof because a surplus of $3,027.66 was applied in payment of taxes, instead of being reported to "be distributed according to the further order of this court." The amount due under the decree was $101,875.92. The taxes paid after decree and before sale were added, and the property struck off for the $104,903.56 total. If complainant had not paid these taxes by May 1st, right of redemption from tax sale would have been lost. We think this was permissible and within the spirit of the decree, which makes special reference to any taxes, assessments, rates, and liens due and unpaid, which may be paid by complainant.

It appears by the supplemental record that on August 24, 1911, the premises were redeemed by Josephine Gaukler, who owned the equity of redemption, having foreclosed a second mortgage on the property, and also obtained deeds from defendants. She paid the full amount required to redeem from this foreclosure to the register of deeds, reserving all rights which she may be entitled to under a final decision in this case. She having acquired the original title of defendants and redeemed the property, this so-called surplus would be hers. It was

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applied in payment of taxes on her property and redemption of the same from tax sales.

Complainant paying such taxes as mortgagee would succeed to the lien therefor on the land, and in a court of equity would be entitled to reimbursement out of any surplus on foreclosure sale. *Noeker* v. *Howry*, 119 Mich. 626 (78 N. W. 669).

The matters complained of are at most irregularities, known to defendants at the time of their occurrence or soon thereafter. A party relying upon irregularities must act with the utmost promptness in order to obtain relief. *Goodwin* v. *Burns*, 21 Mich. 211; *Lyon* v. *Brunson*, 48 Mich. 194 (12 N. W. 32).

Upon a review of this whole case, we are not only satisfied that defendants had full knowledge of all facts on which claim for relief is based and have no substantial and meritorious grounds of complaint, but the only result of granting the relief they ask would be to further protract this litigation and delay the inevitable collection of money borrowed from, and heretofore found honestly due, complainant. This suit, to foreclose a mortgage and collect borrowed money, was begun on May 13, 1908. Arthur H. Gaukler, president of the defendant Electric Park Amusement Company, examined as a witness in this case, testified as follows:

"*Q.* I ask you whether or not all this litigation * * * introduced by way of defense to the Schmidt mortgage, by way of defense to the cross-bill and otherwise, to the first mortgage, was directed by you or Mrs. Gaukler in this business for the purpose only of delaying these proceedings as long as possible in coming to their ultimate foreclosure?

"*A.* Mr. Radford was given direct orders by me to use every legal means of staving off the final day as long as possible, and he has that order now."

The voluminous records in this case and numerous technical and dilatory proceedings it discloses indicate clearly that the mandate of Gaukler has been ingeniously and tenaciously followed with marked success.

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There comes a time when strife should end in every contention. In the final winnowing of this case we fail to discover any remaining equities for defendants, and think the orders of the circuit court should stand affirmed, with costs.

MOORE, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

POLLOCK *v.* DETROIT UNITED RAILWAY.

1. CORPORATIONS—PROCESS—COMMENCEMENT OF ACTIONS—VENUE.
   A resident of Missaukee county, claiming to have been injured in Oakland county, into which defendant's electric railway lines extend, could institute an action in that county, where it maintained stations and ticket agents, though the principal place of business of the corporation was in the county of Wayne. 2 Comp. Laws, § 6454; 3 Comp. Laws, §§ 10022, 10468; Act No. 208, Pub. Acts 1901.

2. SAME—RESIDENCE—JURISDICTION.
   For purposes of jurisdiction the corporation is deemed a resident of any county where the road is operated or corporate powers exercised, and of each county where it has an office, agency, or agent for service of process.

Certiorari to Oakland; Smith, J. Submitted November 21, 1911. (Docket No. 60.) Decided March 12, 1912.

Case by Robert Pollock against the Detroit United Railway for personal injuries. Defendant filed a plea to the jurisdiction. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Lynch, for appellant.

Andrew L. Moore, for appellee.

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MOORE, C. J. The plaintiff is a resident of the county of Missaukee. The defendant is a corporation having its principal office in the city of Detroit. The defendant company owns and operates lines of electric cars, one of which runs through Oakland county, called the "Flint Division." On the 12th day of July, 1910, a collision of cars belonging to defendant occurred within the limits of Oakland county. Plaintiff claims he was injured in this collision, and brought suit in the circuit court for the county of Oakland. Service of process was had upon the agent of defendant company at Pontiac. The defendant interposed a plea, raising the question of the jurisdiction of the circuit court for the county of Oakland for the reason that, as neither the plaintiff nor the defendant was a resident of Oakland county, the circuit court for the county had no jurisdiction. The return of the circuit judge states that the city of Pontiac, Oakland county, is the terminus of the Detroit United Railway Companies lines, and that an assistant division superintendent is stationed at Pontiac, that a station is maintained at Pontiac, where tickets are sold, and a station where freight is received and unloaded. Counsel are agreed that "the only question involved in this case is the determination whether, under the state of facts above outlined, the circuit court for the county of Oakland has jurisdiction to try this case."

Section 2, art. 12, of the Constitution, provides:

"All corporations shall have the right to sue and be subject to be sued in all courts in like cases, as natural persons."

The contention of counsel for appellant is as follows:

"This constitutional language, it seems to me, is very plain, and places corporations and natural persons in exactly the same class, and that no extraordinary privileges are granted to corporations, neither are they to be shorn of any rights which belong to natural persons.

"The second subdivision of section 10216 of the Compiled Laws of 1897 reads as follows:

"'Actions of slander, for libels, and all other actions for wrongs,

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and upon contracts, shall be tried in the county where one of the parties shall reside at the time of commencing such action, unless the court shall deem it necessary for the convenience of parties and their witnesses, or the purposes of a fair and impartial trial, to order any such issues to be tried in some other county; in which case the same shall be tried in the county so designated.'"

His contention is that the foregoing provisions are not changed by the provisions of sections 10022, 10468, 3 Comp. Laws, and Act No. 208, Pub. Acts 1901. We quote further from the brief:

"The foregoing contains all the statutory provisions bearing upon the question raised in this case. It will be noted that in sections 10468 and 10022 there is no reference to the residence of the corporations. Nor is there any expression from which an inference can fairly be drawn that there is any intent to change the rule of law as laid down in section 10216 to the residence of parties. Corporations, like individuals, must have some place of residence or domicile. A corporation, as a body, is entirely distinct from the individuals composing it. The individual stockholders may live in any or all parts of the world, but a corporation cannot be permitted to be a peregrinating body. It must, like an individual, have a fixed place of residence where it can be found. This is for the interest of those who may wish to deal with the corporation, and, if necessary, to sue it. It must follow that that residence, having been fixed, remains there, and cannot and does not change to suit the whim or convenience of individuals who may care to institute proceedings remote from its place of residence. It has the same rights in this particular as natural persons, under the provisions of our Constitution."

On the part of the plaintiff it is insisted that the rule which applies to individuals that suit must be brought in the county where one of the parties resides does not apply to suits against steam or electric railways. Neither of the counsel is able to call our attention to a case where the precise question involved here has been passed upon by this court. It becomes important, therefore, to carefully consider the statutory provisions. Sufficient has already been quoted from section 10216. Chapter 168, 2 Comp.

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Laws, provides for the incorporation of street railway companies. Section 4 of that chapter (section 6437, 2 Comp. Laws) contains the following:

"Said articles of association may be filed in the office of the secretary of State and thereupon all persons who have subscribed the same and all persons who shall from time to time become stockholders in such company shall be a body politic and corporate by the name specified in such articles and by such name shall be capable of suing and being sued in any court of this State."

Section 6448, 2 Comp. Laws, authorizes the purchase and operation of other street railways. Section 6454, 2 Comp. Laws, reads:

"Service of every summons, notice, declaration or other legal process may be made on any street railway company by leaving a copy thereof at the business office of the company, with any person in charge thereof, or by leaving such copy with any director or officer of the company in the county where the road of such company is located."

Section 10468, 3 Comp. Laws, reads in part as follows:

"Suits against corporations may be commenced by writs of summons or by declaration, in the same manner that personal actions may be commenced against individuals, and such writ or a copy of such declaration in any suit against a corporation shall be served on the presiding officer, cashier, secretary or treasurer, or any other officer or agent of such corporation, or by leaving the same at the banking house or office of such corporation, and may be served in any county in the State where the plaintiff resides."

It was held in *Turner* v. *Tunnel Co.*, 102 Mich. 574 (61 N. W. 72), that section 10022, 3 Comp. Laws, was supplemental to section 10468, and was intended to facilitate service on domestic corporations. Section 10022 reads as follows:

"Be it enacted by the senate and house of representatives of the State of Michigan, that whenever in any suit or proceeding either in law or equity, it shall become necessary to serve any process, notice, or writing upon any railroad company in this State, it shall be sufficient to

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serve the same upon any station agent, or ticket agent at any station or depot along the line, or at the end of the railroad of such company, and such service shall be deemed as good and effectual as if made on the officers, stockholders, or members, or either of them, of such company."

Section 6454, 2 Comp. Laws, is supplemented by the provisions of Act No. 208, Pub. Acts 1901, which read as follows:

"Whenever in any suit or proceedings, either in law or equity, it shall become necessary to serve any process, notice or writing upon any corporation owning or operating any interurban electric railway in the State of Michigan, it shall be sufficient to serve the same upon any station agent, or ticket agent, at any station or depot along the line of or at the end of the railroad of such company, or upon any conductor upon any of the cars of such company along the line of or at the end of the railroad of such company, and such service shall be deemed as good and effectual as if made on the officers, stockholders or members, or either of them, of such company: *Provided*, that the modes of service herein provided for shall be in addition to those already in existence: *And provided further*, that the provision for service upon conductors of electric railways shall not apply to conductors on electric railways operating within the limits of incorporated cities."

While, as before stated, this court has not passed upon the question, a like question has been before other jurisdictions. In speaking of railroad corporations in the text of 23 Am. & Eng. Enc. Law (2d Ed.), p. 679, the following language is used:

"The residence of the corporation is in the State where it was created, irrespective of the residence of the corporators. For purposes of jurisdiction the corporation is deemed a resident of any county where the road is operated or corporate powers exercised, and in each county where it has an office, agency, or agent for services of process"—citing in notes a very large number of cases.

See *United States* v. *Railroad Co.* (C. C.), 49 Fed. 297; *The People* v. *Fredericks*, 48 Barb. (N. Y.) 173; *Schoch* v. *Railroad Co.*, 55 Minn. 479 (57 N. W. 208).

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In *Smith* v. *Assurance Society*, 159 Mich. 167 (123 N. W. 588), Justice MONTGOMERY, speaking for the court, said:

"As a general rule, transitory actions must be brought in the county where service of process must be had, which is usually, although not necessarily, the county of residence of the defendant. * * * The general rule and statutes relating to service of process fix jurisdiction, and undoubtedly the action might be brought in the county of plaintiff's residence or in any county where service might be had upon a duly authorized agent of the defendant."

When these provisions are all read and considered together, and the authorities we have cited are applied and are taken in connection with the work done by corporations like defendant, the inference is irresistible that, when one has a cause of action against such a corporation that may be tried in a circuit court, any circuit court of a county in which process may be served may take jurisdiction of that cause of action. Such a construction does not involve any hardship. Process can be served only where the defendant company is enjoying the privilege of its franchise, and is engaged in the business for which it was organized. The instant case is an illustration of the desirability of such a construction. The plaintiff lives in the northwestern part of the lower peninsula. The principal office of the defendant is in the extreme southeastern part of the State. The cause of action, if any, arose in Oakland county. It is fair to assume that the witnesses reside in that county. It would be impossible for the plaintiff to serve process in the county where he lives because the defendant is not in the exercise of any of its franchise rights in that county. It would seem to be desirable, from every point of view, to have the case tried in the county where the occurrence happened that gave rise to the cause. We have no doubt the circuit court for Oakland county has jurisdiction to try the case.

Judgment is affirmed.

STEERE, MCALVAY, BROOKE, and BLAIR, JJ., concurred.

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DAVIS v. MCCAMMAN.

1. EQUITY—PLEA—ARGUMENT—PLEADING.
   Where complainant's bill to vacate certain proceedings in probate court for fraud was amended, and defendant filed a plea alleging that the issues were tried and determined in probate court, and that complainants had notice and appeared by counsel, the bill was properly dismissed at the argument of the legal questions presented by the plea, on which complainants did not take issue.

2. FRAUD — ASSIGNABILITY OF CLAIM — EXECUTORS AND ADMINISTRATORS.
   A right to complain of fraudulent conduct of an administrator in filing accounts, and in his conduct in the matters of the estate, is not assignable.

3. PROBATE COURT—JURISDICTION OF EQUITY.
   Where complainants lost, by failure to act seasonably, their opportunity to prosecute their rights in probate court, chancery does not obtain jurisdiction to set aside the orders made.

Appeal from Eaton; Smith, J. Submitted November 22, 1911. (Docket No. 161.) Decided March 12, 1912.

Bill by Charles J. Davis and another against James R. McCamman, as administrator of the estate of Malvina R. McCamman, deceased, and another, for an accounting and other relief. From a decree sustaining a plea to complainants' amended bill, complainants appeal. Affirmed.

Samuel H. Davis (*O. H. Reed*, of counsel), for appellants.

Horace S. Maynard, for appellees.

STEERE, J. On March 31, 1911, an opinion was rendered in this court in the above-entitled suit sustaining a decree of the circuit court of Eaton county dismissing complainants' bill.

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Following that decision, complainants again filed substantially the same bill of complaint, adding, however, certain allegations of due diligence after discovery of fraud complained of, lack of notice, and other matters of like nature, framed to comply with suggestions found in the last paragraph of the opinion referred to. Said opinion, reported in 165 Mich. 287 (130 N. W. 691), sufficiently states the nature of the controversy, which need not be repeated at length here. Defendants filed substantially the same demurrer and plea as before. The plea was set down for argument, and on the hearing the circuit court allowed the plea and dismissed complainants' bill, holding that the amendments to the same in no way strengthened complainants' former claim. The matter is now again before this court for review.

Defendants' plea is duly sworn to, and properly certified, as required by Chancery Rule 8. No issue having been taken thereon, the only question involved is its legal sufficiency as against complainants' bill. *Detroit, etc., R. Co.* v. *McCammon*, 108 Mich. 368 (66 N. W. 471); *Shafer* v. *Thompson*, 109 Mich. 406 (67 N. W. 511); *Hurlbut* v. *Britain*, Walk. Ch. (Mich.) 455. The bill was filed to set aside certain orders and decrees made by the probate court of Eaton county in the matter of the estate of Malvina R. McCamman, deceased, and to obtain a trial of matters relating to the management of said estate. It asks an accounting by defendant McCamman as administrator, charges him with concealing assets and rendering false accounts in fraud of complainants' rights, prays that he be required to deliver up certain properties, and pay over certain moneys of the estate fraudulently appropriated by him. The right to apply to a court of chancery is based on the claim of fraud and concealment of the fraud until it is too late to appeal or obtain reopening of the orders and decrees in the probate court. The plea sets out in detail the many proceedings had in the probate court, shows that each and every matter complained of was before that court, heard, tried, and deter-

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mined by it, that complainants had due notice and knowledge thereof, and were represented by counsel in every step of said proceedings. The record shows that administration of the estate of Malvina R. McCamman was begun in the probate court of Eaton county in March, 1901, and is still pending in said court.

On September 10, 1909, complainant Mary A. Lindsay Smith, by proper indenture, transferred her entire interest in the estate to complainant Davis. He appears to be relying on claims of fraud committed against his assignor. She, though a nominal party to the suit, has no real interest in it. He cannot avail himself of any fraud practiced on her. A right to complain of fraud is not an assignable commodity. *Brush* v. *Sweet*, 38 Mich. 574; *Dickinson* v. *Seaver*, 44 Mich. 624 (7 N. W. 182).

As the case presents itself by the record, complainants are seeking an opportunity to retry issues which were tried in the probate court and determined against them, relating to matters within the jurisdiction of said court and in which equity has no power of interference except where, by fraud or mistake, unusual conditions preclude an adequate remedy in the probate court in the first instance. The plea is to be taken as true under the rules of pleading. The bill and plea taken together disclose the case in all vital essentials to be the same and no stronger than when formerly before this court. It was there said:

"The record shows that the probate proceedings were regular. The bill does not successfully impeach them for fraud."

As was said in *Winegar* v. *Newland*, 44 Mich. 369 (6 N. W. 842):

"It is not perceived that any ground is set forth here for equitable cognizance. Complainant's remedy, if not lost by neglect to take steps in season, is in the court of probate. And, if it has become impracticable to prosecute redress in that forum by reason of having failed to move seasonably, it neither widens the scope of equity nor gives him any title to proceed in chancery."

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We think the circuit judge was correct in his conclusion that the case did not justify the intervention of a court of equity, and that he properly dismissed the bill of complaint.

The decree is affirmed, with costs.

MOORE, C. J., and MCALVAY, BROOKE, and BLAIR, JJ., concurred.

CHRONOWSKI *v.* ZIELINSKI.

1. ABATEMENT AND REVIVAL — DISCONTINUANCE — DISMISSAL OF BILL IN CHANCERY—EQUITY PRACTICE—DECREE OR ORDER.
   After the filing of a stipulation discontinuing a foreclosure suit by mutual consent, the proceedings were not a bar to a second foreclosure suit in which defendant, by plea in abatement, set up the pendency of the first proceeding alleging that no final order of dismissal had been entered by the court.

2. SAME—EQUITY—NUNC PRO TUNC ORDER.
   And an order entered in the first cause, after the plea in the second cause was filed, discontinuing the suit as of the date of the stipulation, operated as a formal discontinuance at the time of filing the stipulation.

Appeal from Wayne; Rohnert, J. Submitted November 21, 1911. (Docket No. 68.) Decided March 12, 1912.

Bill by Stanislaus Chronowski against John Zielinski, Barbara Zielinski, and the German-American Bank for the foreclosure of a mortgage. From a decree for complainant, defendants Zielinski appeal. Affirmed.

George F. & Peter J. Monaghan, for complainant.

Ezra P. Beechler, for defendants.

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McALVAY, J. This is an appeal from a decree in favor of complainant and against defendants of the ordinary foreclosure of a real estate mortgage. A prior mortgagee, the German-American Bank of Detroit, was made a party defendant, and the foreclosure was taken subject to such prior mortgage, the lien of which was acknowledged as prior and paramount to the lien of complainant upon the premises in question. No relief was prayed or decreed against such prior mortgagee, and none of its rights are involved in this appeal.

It appears that on August 18, 1908, a suit in chancery was begun by this complainant against the same defendants for the foreclosure of this identical mortgage. On March 7, 1910, after the appearance therein of the defendants, who are appellants, a stipulation in writing, theretofore made and entered into by and between the parties to said cause, by their respective solicitors, discontinuing the same, was filed and entered therein. The material portion of this stipulation, duly executed, reads as follows:

"It is hereby stipulated and agreed by and between the parties to the above-entitled cause, through their respective solicitors, that the above-entitled cause be, and the same is hereby, discontinued without costs to either party, and without prejudice.

"Dated Detroit, Michigan, February 9, 1910."

In the instant case, appellants, having appeared, filed a plea in abatement therein June 21, 1910, on the ground of a former suit pending for the same cause of action, alleging—

"That said suit has never been discontinued; a stipulation for discontinuance having been filed, but no order or decree having been entered in pursuance thereof."

Under petition of complainant, duly made in the first case, praying for an order *nunc pro tunc* as of the date of the filing of the stipulation of discontinuance, such order was granted October 12, 1910.

The plea in abatement of the appellants came on to be

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heard October 31, 1910, and was overruled for the reason as appears in the opinion of the court, as follows:

"I hold that the filing of that stipulation discontinued the case, and that it is not necessary that a formal order of discontinuance be entered. It is notice to all parties in the case of the discontinuance, and until it is set aside it would not permit any further proceedings in the case. The discontinuance disposes of the subject-matter for the purposes of that case, leaving only the question of costs to be determined, either in accordance with the stipulation, or in accordance with the law. So that I hold at the time of the commencement of the second case, May 12, 1910, the first case was not pending."

In the order overruling the plea in abatement, the defendants were allowed 10 days to answer the bill of complaint. Defendant Barbara Zielinski answered. The bill was taken as confessed as to John Zielinski. A hearing was had upon the bill of complaint and answer filed, and proofs taken in open court. The decree of foreclosure in favor of complainant was granted.

No question is raised upon this appeal, except upon the action of the court in overruling the plea in abatement. Appellants state in their brief:

"The only question in this case is whether this plea was effective."

We think that the reasoning of the learned circuit judge is conclusive that the stipulation discontinued the case, and until set aside no further proceeding could be taken in the case. It was not the usual stipulation, agreeing that an order of discontinuance might be entered. Its terms were "that the above-entitled cause may be, and the same is hereby, discontinued without costs." It disposed of that case by a discontinuance agreed upon and signed by the parties. We do not understand that any court has held that a stipulation in these terms does not absolutely discontinue a case.

The contention of appellants is purely technical, and if this stipulation had been in the usual form it would have

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no merit, for the reason that the weight of the authority, in our opinion, would sustain a holding that the order *nunc pro tunc* would operate as a formal discontinuance of that date.

The decree is affirmed, with costs to complainant.

MOORE, C. J., and STEERE, BROOKE, and BLAIR, JJ., concurred.

THOMAS v. TOWNSHIP OF BYRON.

1. TRIAL — CONDUCT OF ATTORNEY — PREJUDICIAL MISCONDUCT — EXAMINATION BY PHYSICIAN—PRIVILEGE.

   Persistent attempts by defendant's attorney to ask of a physician questions calling for information of a privileged nature, under repeated objection by plaintiff's attorney, and numerous adverse rulings of the court, for the sole purpose and with the obvious intent of prejudicing the jury, was reversible error.

2. EVIDENCE — PRIVILEGED INFORMATION — PHYSICIANS AND SURGEONS—ESTATES OF DECEDENTS—AUTOPSY.

   Testimony of a physician as to conditions discovered by him in an autopsy held against the consent of the patient's husband after he had acted as the attending physician of decedent in her lifetime, and had obtained privileged information, as a result of which situation he was enabled to make the examination after death, was improperly received over the objection of attorney for the husband, as administrator, in a personal injury action.

3. SAME — IMPEACHMENT — IMMATERIAL OR COLLATERAL ISSUE — HEARSAY—ADMISSIONS—EXECUTORS AND ADMINISTRATORS.

   Admissions of the administrator concerning the result of such autopsy and the cause of his wife's death, being hearsay, since he could not bind the estate, and because he could not be impeached on immaterial and collateral matters, were improperly admitted in evidence.

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Error to Kent; McDonald, J. Submitted November 22, 1911. (Docket No. 165.) Decided March 12, 1912.

Case by Charles R. Thomas as administrator of the estate of Alta Thomas, deceased, against the township of Byron, for the wrongful injury and death of decedent. Judgment for defendant. Plaintiff brings error. Reversed.

Geo. E. & M. A. Nichols, for appellant.

Dunham & Phelps, for appellee.

MCALVAY, J. This action was brought by plaintiff, as administrator of the estate of his deceased wife, to recover damages arising from injuries which caused her death, which injuries were received by her while riding along a highway in said township, resulting from the negligence of defendant in not maintaining such highway in reasonable repair and in condition reasonably safe and fit for travel. The result of a trial was a verdict by the jury of no cause of action, upon which a judgment was entered. Plaintiff has removed the case to this court for review upon writ of error.

The errors assigned which are presented and discussed before this court by appellant which are necessary to be considered are: (*a*) Relative to the conduct of counsel for defendant in persistently repeating improper questions to the attending physician after they had been passed upon and excluded by the court. (*b*) Relative to the admission and rejection of evidence.

The facts, as claimed by plaintiff, are that on the 25th day of November, 1907, he was driving to Byron Center, in company with his wife, to do some trading, with a single horse and buggy along a highway in this township, which had been used for public travel for many years; that part of this road runs through a swamp and had been constructed as a corduroy of logs covered with earth, which at this time was about two feet in depth; that this part of the

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road had been cut up by traffic over it earlier, leaving ruts and holes in the earth above the logs, one of which was of considerable size and quite deep. On the trip to town he avoided this hole, except with one wheel, by driving around it. On the return, when they came near where the hole was located, it was dark, and plaintiff, driving carefully at a walk, could not tell when he reached this hole because it was too dark. Suddenly the buggy plunged down and stopped, then started again, going over something which threw his wife forward over the wheel. He grabbed her, and drew her back into the buggy, stopping the horse as soon as he could within a few feet. He got out to ascertain if the buggy was broken. He lighted matches and looked into the hole. His wife became sick and vomited on the way home. When they arrived home she went to bed and complained of her side. There was a mark across her side about five inches long. He rubbed some liniment on which eased the pain. She continued to complain of this pain until her death, which occurred April 3, 1908.

A physician was called some time after the accident, who visited her almost daily, and sometimes twice a day, until the child was born on December 21st. On the day after the birth of the child she had a discharge of pus of very bad odor through the rectum, and later several similar discharges. She was feverish with chills, grew thin, and always complained of her side. There appeared a hard swelling on her side at the place of the injury, which softened after the discharges. Before the injury she had always been a healthy, vigorous person. She was up and around from time to time until the latter part of March, when she took to her bed and died April 3d. The undertaker testified that in preparing the body for burial he found a swelling on her side from which he removed two or three pints of pus.

On the part of the defense it was claimed that no such hole existed in this road at the time; that deceased was in an anæmic condition at the time of her claimed injury:

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that her death was caused by pernicious anæmia, and not by the injury claimed.

The physician who was called to attend the deceased after the accident, and until the time of her death, was called as a witness by the defendant. He testified that he knew deceased and attended her during her last sickness. He stated the different times he so visited her, and that during that time he diagnosed her case and determined in his own mind what was the matter with her.

"*Q.* I will ask you what it was? (Objected to by plaintiff's counsel as incompetent.)

"*The Court:* The objection is sustained. * * *

"*Q.* How did you examine her? (Same objection.)

"*The Court:* The objection is sustained.

"*Q.* What did you do by way of examination? (Same objection.)

"*The Court:* The same ruling. * * *

"*Q.* What were you called there for?

"*Mr. Nichols* (Counsel for plaintiff): I submit that counsel ought not to persist in that line of interrogation, may it please your honor, knowing as he does just as well as the court, and all the rest of us, that it is wholly incompetent.

"*Mr. Phelps* (Counsel for defendant): Well, I have a perfect right to ask the question, and if you want to object, you have a right to.

"*Mr. Nichols:* It is objected to, that is sure.

"*The Court:* The objection is sustained. * * *

"*Q.* Before this woman died, what did you diagnose her case to be?

"*Mr. Nichols:* That is objected to as being incompetent.

"*The Court:* The objection is sustained. * * *

"*Q.* During the time you were attending Mrs. Thomas, and before her death, did you see her abdomen?

"*Mr. Nichols:* That is objected to as incompetent, irrelevant, and immaterial.

"*The Court:* The objection is sustained.

"*Mr. Phelps:* Well, now, if your honor please, I don't wish to insist, but I wish to follow that question. If he says he saw it, if he answers that he saw it, I wish to follow it by the question as to whether or not there was any swelling or any tumefaction. Now that question

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would undoubtedly come under the statute if they are a mind to take advantage of it, and if they take advantage of it, we are entitled to the advantage that we may take of it before the jury.

"*Mr. Nichols:* I take an exception to that kind of a performance in court.

"*The Court:* I have ruled on it, and I have ruled the matter out, and you may proceed with the examination.

"*Mr. Phelps:* Well, our court bears me out.

"*The Court:* You have got your objection and your exception is taken. Proceed. (Exception by Mr. Phelps.)

"*Q.* I will ask you this question, Doctor: During any of the times that you attended Mrs. Thomas from the 13th of December, before the birth of the child, down to the time of her death, did you ever discover any black and blue marks on her side, or any discoloration, or any tumefaction or anything here upon the left side to indicate that there was a pus sac inside?

"*Mr Nichols:* I object to that as incompetent and take an exception to counsel asking the question. He knows better.

"*The Court:* The objection is sustained.

"*Mr. Phelps:* I have a right to ask the question.

"*Mr. Nichols:* You have no right to ask these questions.

"*The Court:* Go on, Mr. Phelps, proceed."

From the foregoing quotations from the record it appears from his own statements that counsel for defendant understood that the questions he repeatedly asked were not proper, and that, if objected to, would not be admitted, yet he continued persistently to repeat his questions, and the court was obliged many times to rule upon the same proposition. The conduct of counsel cannot be approved, and his intimation that he had a right to continue repeating these questions during his pleasure indicates a deliberate intention to get before the jury incompetent testimony. This court has repeatedly held that such conduct will not be tolerated. In an early case this court in effect said that when, upon an offer of evidence, once a distinct ruling is obtained, other offers covered by such ruling must not be made. *Scripps* v. *Reilly*, 38 Mich., at page

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14. Later this case was followed, the court holding that counsel should not offer testimony in the presence of the jury which they know is incompetent. *Phillips* v. *Benevolent Society*, 120 Mich. 142 (79 N. W. 1). In a later case the court said:

"To the rulings of the court the attorney for the defendant seemed to pay no attention, as the following instance will illustrate: Upon the cross-examination of Mrs. Whitman the same question was repeated to her three times, notwithstanding the court each time ruled the question as incompetent, and the ruling was correct. The sole purpose of the question was to prejudice the jury. A severe reprimand, if nothing more severe, should have been administered." *Atherton* v. *Defreeze*, 129 Mich. 365 (88 N. W. 886).

This court has never departed from this rule. It is a general rule applicable in every case. It applies not only to privileged communications excluded by the statute in question, but to all testimony persistently offered after the trial court has squarely and clearly ruled upon it as inadmissible. The court in the *Scripps Case, supra*, has clearly and logically stated the principle upon which this rule is founded. In a case where a physician has been allowed to testify as to the communications privileged by the statute, Mr. Justice COOLEY, speaking for the court, said:

"This evidence ought not to be passed over without remark. It is surprising evidence for many reasons. One of these is that the physician had no business to give it. (The statute is cited and quoted). Every reputable physician must know of the existence of this statute; and he must know from its very terms, as well as from the obvious reasons underlying it, that it is not at his option to disclose professional secrets. A rule is prescribed which he is not to be 'allowed' to violate; a privilege is guarded which does not belong to him, but to his patient, and which continues indefinitely, and can be waived by no one but the patient himself." *Storrs* v. *Scougale*, 48 Mich. 387 (12 N. W. 502), and cases cited.

The conduct of counsel for defendant, as herein pre-

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sented, amounted to prejudicial error committed upon the trial.

On his examination the plaintiff, administrator, testified that he was not present at any autopsy upon the body of deceased, and that he refused to give his consent to have Dr. Peppler (the attending physician) perform it. The doctor, who is the same one whose testimony defendant so persistently sought to get into the case under circumstances heretofore discussed in this opinion, performed the autopsy, and, while upon the stand as a witness for defendant, testified that plaintiff, before that time, had stated that deceased had received an injury in an accident, and he knew what plaintiff claimed before he made the autopsy, and stated plaintiff was not present at the time. He was then asked the following question:

"*Q.* Will you state, Doctor, what you found in your post mortem?

"*Mr. Nichols*: Objected to as incompetent, immaterial, and irrelevant.

"*The Court*: The objection is overruled. (To which ruling plaintiff duly excepted.)

"*Mr. Nichols*: As representing the estate, I submit that a post mortem under such conditions is incompetent and immaterial. (The objection was overruled, and plaintiff excepted.)"

This doctor then proceeded to give in minute detail what conditions he found as the result of the autopsy. A question as to what, before her death, he had diagnosed her case to be was excluded upon objection by plaintiff, but he was allowed to testify, over a like objection with an exception, what, when he had finished the autopsy, his conclusion was as to the cause of death of this woman.

Upon the part of the plaintiff it is contended that, on this record, where neither deceased nor the representative of her estate had waived the statutory privilege, it was error to permit the physician who attended her, from the time of her injury to her death, to testify to the results of an autopsy, and his conclusions therefrom as to the cause of her death. It is a question of first impression before

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this court, and one upon which the authorities give no great assistance. There is no dispute but that the relation of physician and patient existed during the lifetime of plaintiff's decedent, or that all communications and knowledge which are within the inhibition of our statute received by this physician during her lifetime were privileged and so continue, there having been no waiver; but it is claimed that the death of the plaintiff's wife made this testimony competent. From the examination of this witness we conclude, by the questions asked, the answers to which were excluded as privileged, that he had during the lifetime of the patient made such an examination of her person, and received such information, as was necessary to diagnose her case and prescribe for her, and also that he had disclosed to defendant's attorney such facts. We must conclude from the record that on account of this relation, which existed between the witness and deceased, it was possible for him to proceed within a few hours after her death to hold an autopsy.

No case is cited by counsel, nor have we been able to find any, where the exact question here presented has been passed upon. Defendant relies upon the case of *Harrison* v. *Railway Co.*, 116 Cal. 156 (47 Pac. 1019), in support of the contention that the testimony of the doctor as to what the autopsy disclosed and his conclusions therefrom was competent and admissible. The headnote and part of the opinion in that case is misleading. The opinion states clearly that the relation of physician and patient never existed during the life of the deceased. Deceased was a passenger on a street car which collided with a brewer's truck, causing the injury. The doctor in the employ of the brewery came and examined the man for his employer. What the opinion states further has no bearing upon this question before us.

This statute without amendment has been in force in this State since the Revision of 1846. Its provisions are therefore a part of the fixed policy of the State. This court has given it a liberal construction in protecting the

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privilege of the patient created by it. To allow the testimony of this attending physician as to this autopsy, and his conclusions therefrom, would operate to take away such privilege clearly granted. This testimony is improperly in the case. Any other construction and determination is not in harmony with our construction of this statute and cannot be entertained. It was error to admit it.

Error is alleged upon the ruling of the court, over objection, allowing cross-examination of plaintiff, administrator, concerning alleged statements made by him relative to an autopsy and the cause of his wife's death, and the liability of the township in relation thereto, and to make such cross-examination the basis for introducing impeaching testimony. The court in his charge held that this testimony was immaterial upon the issue in the case, *i. e.*, the liability of the municipality, but was admissible as bearing upon the credibility of the witness. The witness could not bind the estate of his deceased wife by his admission, and the testimony relative to the autopsy was hearsay. The rule is well settled that a witness cannot be impeached on collateral or immaterial matters. The court was in error in admitting the testimony for that purpose.

Other errors claimed are of minor importance and do not require discussion, as there is no probability of a recurrence upon another trial.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial ordered.

STEERE, BROOKE, and STONE JJ., concurred. BLAIR, J., concurred on the first and third grounds.

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PRISEL *v.* CONEY.

1. APPEAL AND ERROR—MASTER AND SERVANT — DIRECTING VERDICT—MINOR EMPLOYÉ.

   In considering, on error, a case for personal injuries of an employé against whom a verdict was directed by the trial court, defendant's evidence does not require consideration: the question is whether plaintiff's evidence, given its strongest probative force, was sufficient to support a verdict.

2. MASTER AND SERVANT—NEGLIGENCE — DEFECTIVE MACHINERY —INFANTS.

   And though plaintiff was young and inexperienced, and was unable to explain the nature and method of operation of the stamp press on which he was employed, his unsupported or contradicted testimony that a certain spring was loose, that the press repeated at different times when he did not trip the mechanism, that he advised his employer of the defect, and received from him a promise to repair the defect, and was injured while working in reliance on his master's promise before the press was repaired, presented a case for the jury.[1]

Error to Wayne; Donovan, J. Submitted November 24, 1911. (Docket No. 180.) Decided March 12, 1912.

Case by John Prisel, by next friend, against James D. Coney for personal injuries. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Reversed.

Samuel E. Jones, for appellant.

George F. & Peter J. Monaghan, for appellee.

MCALVAY, J. Plaintiff sued defendant to recover damages claimed to have been caused to him while operating a certain machine as an employé in defendant's factory in

[1] As to rights of servant continuing work on master's promise to remove a specific cause of danger, see notes in 40 L. R. A. 783; 27 L. R. A. (N. S.) 1053; 29 L. R. A. (N. S.) 597.

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Detroit. After hearing all of the proofs in the case, a verdict was instructed by the court in favor of defendant. Plaintiff reviews the judgment upon writ of error. The only error assigned relates to the instruction directing a verdict.

Defendant was a manufacturer of wire specialties. On September 27, 1906, plaintiff, then about 16 years of age, entered into the employment of defendant, at first working as directed about the shop, and then he was put at work on a machine. Finally, three or four weeks before the date of his injury, which occurred April 26, 1907, he put plaintiff at work upon the machine at which he was injured. The machine in question was a new stamping machine upon which were dies, which by the action of the machine stamped and bent wires into certain shapes. The negligence charged in the declaration material to be considered is that the machine upon which the plaintiff was at work became defective and dangerous, in that a certain spring therein became out of condition and defective; that plaintiff notified defendant of this defective condition, and that he promised to repair the defect and put the machine in good condition, and ordered plaintiff to remain at work until the spring and machine were repaired; that plaintiff, relying upon this promise to repair the defective machine, continued such work, and, before defendant had repaired the defective machine and spring, the spring suddenly released the stamping press which came down, and severed the thumb from his left hand; that plaintiff was a boy 16 years and 2 months old, and he used all due care and diligence of which he was capable, considering his youth and inexperience.

Plaintiff was the only witness produced and sworn on his own behalf. There is no dispute as to his age, the experience he had had in operating the machine during his employment by defendant, or that he was injured while operating the machine in question. His testimony is that a spring within a wheel which was connected with the operation of the part of the machine which held the die,

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which operated up and down, became loose three days before the day of the accident, which caused the press punch to repeat; that on that morning he told defendant, personally, of this fact. He testified:

"When he came around in the morning, I told him that the spring coil in the machine was loose, and it was dangerous and defective to work upon, and I told him I was going to quit, and he told me to continue working and he would fix it as soon as possible.

"*Q.* Why did you continue to work?

"*A.* Because he ordered me to and promised to repair it."

On the third day, soon after work began in the morning, the machine again repeated, and caught his hand while he was removing the wires which he was stamping. He testified that he was removing the wires in the manner in which he had been instructed by the defendant, and as he had always done, and the only way he knew how to do it at that time; that he did not cause the machine to repeat by putting his foot upon the treadle and releasing the press punch. It appears without dispute that this machine was operated by electric power; that the wires used in this work were placed upon a form; and that, to cause the stamp press to come down and shape these wires, it was necessary to press the foot of the operator upon a treadle located at the floor on the right side of the machine. On cross-examination witness could not explain the mechanism of this machine, or the exact connection of the spring in the wheel with the operation of it; but throughout his testimony he claimed that the cause of the machine repeating was the loose spring in this wheel. The above is substantially the evidence on the part of the plaintiff presented by the record relative to the injury and its cause.

As the case is presented here, the evidence on the part of the defendant requires no consideration. The court is not considering the weight of the evidence in the case. The question for us to determine is whether we can say,

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as a matter of law, giving his testimony the strongest probative force it is entitled to, that it was not sufficient to submit to the jury the negligence of defendant. *Rumsey* v. *Fox*, 158 Mich. 248 (122 N. W. 526); *Goda* v. *Maurer*, 162 Mich. 621 (127 N. W. 799).

We are unable to come to that conclusion. There is evidence on the part of plaintiff tending to show the cause of this injury to have been the loose spring in the wheel where the mechanism is situated which releases the press. The weight or effect a jury might give to it is not for us to determine. Defendant contends:

(1) "Negligence upon the part of defendant was not affirmatively shown. * * *"

(2) "The alleged promise of defendant to repair the machine, in the absence of proof of defect, imposed no liability upon him."

The whole argument depends upon whether the record supports the first proposition. If it does, the second follows conclusively. It affirmatively appears by plaintiff's testimony (taking it as true) that the machine repeated three days before the accident, notice to defendant of that fact, a promise by defendant to repair as soon as possible, and an order to plaintiff to continue at work.

Taking this view of it, the conclusion follows that the court was in error in directing a verdict for defendant.

The judgment is reversed, and a new trial ordered.

STEERE, BROOKE, BLAIR, and STONE, JJ., concurred.

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KAMM & SCHELLINGER BREWING CO. *v.* ST. JOSEPH COUNTY VILLAGE FIRE INSURANCE CO.

1. INSURANCE — MUTUAL POLICY — FIRE INSURANCE — ASSIGNMENT OF POLICY — CONSENT OF INSURER TO TRANSFER — CHANGE IN TITLE—NOTICE.

   Under provisions of the charter of a mutual fire insurance corporation, permitting insured to assign his policy only upon the written consent of the secretary indorsed thereon, and terminating the insurance upon sale or transfer of property insured, the purchaser of insured premises, who gave no notice to the insurer, and did not obtain the written consent of its secretary to the assignment, could not recover on the ground that defendant's collector, one of its directors, knew of the sale and assignment, and received payments from the agent of plaintiff, the assignee.

2. SAME.

   There being no privity or mutuality of contract between plaintiff and defendant so as to render plaintiff liable to the other members of the mutual company for plaintiff's proportion of their losses, plaintiff, as assignee of such policy, obtained no rights as against the insuring corporation.

3. SAME — PRINCIPAL AND AGENT — OFFICERS OF CORPORATION — CORPORATE DIRECTORS OR AGENTS—WAIVER.

   Agents and officers of mutual fire insurance companies, in which the charter and by-laws determine the rights of members, have less authority than those of stock companies in creating a waiver of conditions contained in contracts: officers have no power to bind their companies by other inconsistent contracts or provisions.

4. SAME — MUTUALITY OF PARTICIPATION IN CORPORATE AFFAIRS.

   The principle which lies at the foundation of mutual insurance, and gives it the name, is mutuality; in other words the intervention of each person insured in the management of the affairs of the company and in the profits and losses of the business in proportion to his interest.

5. SAME—CHANGE IN OWNERSHIP.

   In order to apprise the insurer of material changes in the risk, provisions requiring notice of transfers, change of title, etc., are reasonable and enforceable.

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6. SAME—ESTOPPEL.

And where, after a transfer of insured premises, the assignee of the policy, knowing that assessments were made to the assignor, paid such assessments without securing the required consent of defendant to the assignment, such transferee could not recover, although the collector who received the payment was a director of defendant and had knowledge of the change in title.

Error to St. Joseph; Yaple, J. Submitted December 11, 1911. (Docket No. 196.) Decided March 12, 1912.

Assumpsit by the Kamm & Schellinger Brewing Company against the St. Joseph County Village Fire Insurance Company on a policy of insurance. A judgment for defendant on a verdict directed by the court is reviewed by plaintiff on writ of error. Affirmed.

F. W. Knowlen and *M. L. Howell* (*J. M. Harvey, Jr.*, of counsel), for appellant.

R. R. Pealer and *George E. Miller* (*H. P. Stewart*, of counsel), for appellee.

STONE, J. This is an action on a fire insurance policy. The plaintiff is, and since March, 1887, has been, a corporation organized and existing under the laws of Indiana, the business of which corporation is described in its articles to be the manufacture and sale of beer and malt, to be carried on in the town of Mishawaka, St. Joseph county, Ind. On the 25th day of April, 1905, the plaintiff bought by warranty deed from Mary Withers, the then owner, a lot, including the business building thereon, situate in the village of Constantine, St. Joseph county, Mich. At the time of this purchase the said premises were, and for several years theretofore had been, occupied by William E. Withers, husband and tenant of said Mary Withers, as a saloon. From and after said purchase in 1905, and until the fire hereinafter mentioned, said William E. Withers continued to occupy said premises for a saloon under a lease to him from the plaintiff. Such lease

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bears date March 6, 1905, and contained the following clause:

"It is understood and agreed by and between the parties hereto that second party while occupying said saloon under this lease shall use the Kamm & Schellinger keg beer exclusively, and also handle bottle beer of said Kamm & Schellinger, and give same the preference in sales of bottle beer. Second party to have the privilege of using the ice in the ice-house on said premises, and agrees and undertakes to replace all ice so used, and to refill said ice-house before May 1, 1906."

The defendant at the time of said fire was, and for about 20 years theretofore had been, a mutual fire insurance company, organized and existing under chapter 132, 1 How. Stat. (2 Comp. Laws, § 7266 *et seq.*), and the amendments thereto. By its charter it was authorized to insure business and residence buildings in St. Joseph county, Mich. By said charter the general management and control of said insurance company was vested in the board of directors, consisting of the president, secretary, treasurer, and six directors. Specifically, said board of directors had authority to adopt by-laws, assess members, adjust losses, classify property, make rates, cancel policies, and audit claims against the company. Said charter also provided for a notice of loss to the secretary, or one of the directors, and for the meeting of the board of directors to adjust the loss. By said charter the board of directors directs the secretary to make an assessment roll to meet losses and expenses for the preceding year; and upon approval by said board of such roll they certify the same to the treasurer, directing him to collect the same. Upon receiving such certified roll, it is made the duty of the treasurer to immediately serve a notice upon each and every member of the company, which notice shall contain a statement showing the total amount insured by the company, the amount of loss, and name of person sustaining the loss in each case for which the assessment is made, the amount of expenses, the amount of assessment on each $1,000 in

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the base class, the amount of his or her assessment, and a demand for the immediate payment of the same; also the name of the person to whom payment shall be made. Article 26 of said charter reads as follows:

"The insurance of any member shall cease upon the sale or transfer of the title of property insured, but such member shall be liable for all assessments upon such property, and for his or her equitable share of all losses and expenses incurred by the company, until his or her policy shall be surrendered or canceled. Provided, that upon the sale of any property insured by this company the vendor may assign his or her policy to the purchaser, but such assignment of policy shall not be valid as against this company without the written consent of the secretary indorsed on the policy."

Article 27:

"Any member may withdraw from this company at any time upon surrendering his or her policy to the secretary and the payment of his or her equitable share of all losses and expenses incurred by the company up to the time the policy shall be surrendered."

By the by-laws of defendant company a schedule of classification of risks was provided, by which 12 classes were established; class No. 3 being the base class.

As the circuit judge directed a verdict for the defendant, the plaintiff is entitled to the most favorable view which can be taken of the evidence produced upon the trial. James A. Marsh, a witness for defendant, who testified that he had been a director of defendant company since 1899, and a collector since 1894, testified as follows, on direct examination, as to the practice when the holder of a policy sold the insured property and assigned the policy to the purchaser:

"*Q.* Now, in answer to Mr. Howell's question in which he asked you whether you considered a person a member after an assignment, what have you to say about what is necessary to be done in order to be a member? Now, when did you regard them as members?

"*A.* As soon as there was an assignment made, they

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took the place of the member who had taken out that policy.

"*Q.* Well, before the approval of the secretary?

"*A.* Oh, no.

"*Q.* When the assignment was made and approved by the secretary?

"*A.* I always consider when the assignment is handed to me that that is just as good as the approval, because I then forward it to the secretary.

"*Q.* But there is no assignment ever handed to you?

"*A.* No.

"*Q.* No policy ever handed to you?

"*A.* No.

"*Q.* No application ever made to you?

"*A.* No, sir.

"*Q.* For approval of the assignment?

"*A.* No, sir.

"*Q.* What do you consider the assignment includes when you become a member?

"*A.* I consider that when a policy is assigned to a second person that second person becomes a member in place of the first person.

"*Q.* When?

"*A.* When presented to me or the company.

"*Q.* And approved?

"*A.* Yes, sir.

"*Q.* Have you ever been given any right to approve by any action of the board, to approve of the transfer by assigument of policies?

"*A.* No, sir. I don't approve them.

"*Q.* You don't approve them?

"*A.* No; I don't approve them myself, but consider that the company is binding when that assignment is handed to me, and I forward it to the company.

"*Q.* That is the way you consider it?

"*A.* The same as though I was taking an application.

"*Q.* But you never had any such authority given you by the company?

"*A.* No, sir.

"*Q.* Who approved all the assignments?

"*A.* Mr. Cross.

"*Q.* Who is he?

"*A.* The secretary of the company.

"*Q.* Where does he live?

"*A.* Centerville.

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"*Q.* If you took an assignment—took a policy that had been assigned and sent it over to the secretary and he should refuse to approve of it—then when would you consider it was approved or disapproved?

"*A.* I would consider it void from the time he would notify me—such things have been done."

Recross-examination:

"*Q.* Mr. Marsh, as I understand you, when the sale of the property was made down there, and the policy was assigned and you were given notice of it, the assigning of the policy was as you regarded it, and, as the company's practice was, the assignee of the policy was protected until the secretary disapproved of it?

"*A.* When it was presented to me; yes, sir.

"*Q.* Yes; that is what I mean.

"*A.* Yes.

"*Q.* And approval on the policy was binding during the time from between the time of the presentation to you and the time of Mr. Green's notifying you that it was not approved?

"*A.* I always so considered it; yes, sir.

"*Q.* That was the way—practically that is what you always did do?

"*A.* Yes, sir.

"*Q.* So that if a man bought a piece of property that was insured in the company and the policy was assigned to him, and you were notified of it, he was considered as entitled to notice that it was not approved, or else he would hold the company?

"*A.* Yes, sir."

Redirect examination:

"*Q.* When was that so?

"*A.* What is that?

"*Q.* When was that—when did you do that way?

"*A.* I have always done that way.

"*Q.* Without the policy being presented?

"*A.* Without the assignment being presented?

"*Q.* Yes.

"*A.* Oh, no; I didn't mean to answer that I did that. I meant to answer that the assignment had been presented to me.

"*Q.* And the policy turned over to you and sent up to the secretary to be approved?

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"*A.* Oh, yes. The assignment is on the back of the policy.

"*Q.* In such a case?

"*A.* Then only.

"*Q.* Then only?

"*A.* Yes.

"*Q.* But not in the case where they were not presented at all?

"*A.* Oh, no.

"*Q.* They were delivered to you and sent up to the secretary?

"*A.* Yes, sir.

"*Q.* Now, from your practice whether it was only in such cases where presented to you to send up—delivered to you to send up to the secretary that you refer to?

"*A.* Certainly, we couldn't do anything without the policy.

"*Q.* That there may be no misunderstanding, I wish to ask you whether this policy and the assignment, purported assignment, was ever presented to you in any sort of way?

"*A.* The Withers' policy?

"*Q.* Yes.

"*A.* No; I never saw it."

Recross-examination:

"*Q.* Now suppose the man who made the assignment came in and told you he had made such an assignment, and had sent the policy on to Mr. Cross, that would be just the same, wouldn't it?

"*A.* No, sir. I wouldn't have anything to do with it.

"*Q.* I understand, but the giving of notice to you would be just the same wouldn't it?

"*A.* He has already sent it to Mr. Cross, and I hadn't anything to do with it.

"*Q.* I see. Now, then, was this policy ever delivered to you at any time before Kamm & Schellinger bought it?

"*A.* I don't think so. I think that policy was taken out before I was a member of the company—director of the company.

"*Q.* But it was assigned twice afterwards?

"*A.* Well, I don't think that I could recall it.

"*Q.* Take for instance the assignment of Withers to Mrs. Withers, did you regard this, when you were notified of it, if you were notified of it, and the policy was given to

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you, as vesting—making Mary Withers a member of the company?

"*A.* I don't think I had anything to do with it, but I cannot recall it. It has been some time ago.

"*Q.* The policy was the property of William E. and Frank Withers, and it was assigned to Mary by W. E. Withers only?

"*A.* I have no recollection of that transaction at all.

"*Q.* And that was done in 1900?

"*A.* Well, that was before I had anything to do with it.

"*Q.* And you continued collecting right straight along, didn't you?

"*A.* I wasn't a director I think until about 1899, and I collected from about 1894.

"*Q.* This was done in 1900, which was after you became director.

"*A.* I haven't any recollection of it. Perhaps it was done there and sent by somebody.

"*Q.* And this was considered as protecting Mary Withers, although it wasn't assigned to her by both owners, wasn't it?

"*A.* I told you I don't know anything about it.

"*Q.* And for about five years she continued to pay premiums on it, didn't she?

"*A.* I told you that I knew nothing about that assignment. I don't think I ever had it in my hands. I don't remember of it, at least."

The policy in suit was issued by defendant to Joseph R. Watson on February 9, 1892, signed by Thomas Green, president, and Samuel Cross, secretary. On July 25, 1893, said policy was duly assigned by said Watson to William E. and Frank S. Withers, purchasers of insured property, and the secretary of defendant consented in writing thereto. On June 18, 1900, Mary Withers purchased said property, and on that day said policy was duly assigned to her, and the due consent of the secretary had thereto in writing. From this time until the sale of the insured property and transfer of said policy to the plaintiff, William E. Withers, husband of said Mary Withers, occupied the insured property as his saloon, and for his wife paid each year the assessments on the policy.

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On April 25, 1905, Mary Withers sold and conveyed the insured property to the plaintiff, and duly assigned the policy to the plaintiff. The written consent of the secretary of the defendant company was neither asked nor obtained. The said James A. Marsh, whose testimony has been quoted above, for a number of years had been cashier of the Commercial State Bank of Constantine. Each year, from 1894 down to the time of the trial, the annual list of Constantine policy holders was sent to Marsh for collection, and the policy holders were severally notified by the treasurer to pay, and did pay, his or her assessment to said Marsh at said bank.

The notice to Mary Withers had for many years included the policy in suit, and also another policy covering a dwelling house property. The amount of this dwelling policy and its rate of assessment and amount thereof differed from the saloon risk in suit; the saloon building having been in class 7, and the residence property in class 2. The assessment upon the former was more than twice as high as on the latter. Marsh, the defendant company's collector and director, and cashier of the bank aforesaid, knew of the sale of the property in question by Mary Withers to the plaintiff. He advised the Withers people to sell to the plaintiff, and he knew that the consideration she received from plaintiff was $6,000. This money was paid by plaintiff's check to Mary Withers, which check was cashed by, and deposited with, said Marsh in his bank on the day of sale, and it continued on deposit for about two years; he having given Mary Withers certificates of deposit therefor.

The first annual assessment after the sale of the property, and the transfer of the policy by Mary Withers to the plaintiff, came in January, 1906. The notice of assessment upon the policy came to Mary Withers from the treasurer, and the notice directed her to pay the same to James A. Marsh at Commercial State Bank. William E. Withers, the tenant of plaintiff, went into the said bank and saw Marsh, and he asked Marsh how it came in his

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wife's name after the transfer over to the plaintiff of the policy. Marsh replied that it was just neglect. He then paid Marsh for the plaintiff the amount of assessment on the policy in suit, amounting to $7.20. The notice of assessment for 1906 came, as before, to Mary Withers, and William E. Withers again paid for plaintiff the amount of assessment upon the policy in suit to Marsh in March, 1907. The third notice, namely, of the annual assessment for the year 1907, came again to Mary Withers in 1908; and before the expiration of the time given for its payment, but after the fire occurred, William E. Withers tendered to Marsh the amount of such assessment upon the policy in suit. Marsh declined to receive it. On January 19, 1908, a fire occurred in the building covered by the policy in suit, and serious damage followed. On January 20, 1908, the board of directors met at the Commercial State Bank at Constantine to consider and adjust this loss. The policy was presented to the board by the agent of the plaintiff. The board denied all liability on the sole ground that the transfer of the policy to plaintiff from Mary Withers had not been approved in writing by the secretary.

At the trial it was admitted that the plaintiff, at the time of the commencement of this suit, had not paid any franchise fee or taken any steps under the laws of this State to be authorized to do business in Michigan. At the conclusion of the testimony, defendant's counsel moved the court for a verdict for defendant by direction, for the reason that the plaintiff had not established any evidence of waiver of provisions of the policy, and had not shown its right to bring suit at all in that court. The plaintiff presented certain requests to charge which it will not be necessary to set forth. The trial judge directed the verdict for defendant, as requested, upon the grounds that there had been no written consent of the secretary to the assignment of the policy. He advised the jury that that provision of the charter was a valid one, and that the assignee of the policy acquired no privity or contract rela-

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tion with the defendant, unless such consent be obtained, or such provision waived; and he charged the jury that there had been no such waiver or estoppel as would warrant the submission of the case to them. He thereupon directed a verdict for defendant, and a judgment followed.

The plaintiff has brought the case here upon writ of error, and we shall find it necessary only to consider the sixth assignment of error—that the court erred in directing a verdict for the defendant. Although the circuit judge did not direct the verdict upon the ground that the plaintiff corporation had not complied with the laws of the State of Michigan, and therefore could not maintain suit upon the policy of insurance, nevertheless it is the contention of the defendant that this admitted fact is a bar to the action. By reference to the statute under which the defendant company was organized, and from the charter of the defendant, it appears that this company has no capital stock and was purely a mutual company, each policy holder being a member of the company, entitled to vote at the election of its officers and to take part in the transaction of its business. In other words, it is an organization of the property owners in a prescribed territory for the protection from loss by fire of the members of such organization. Each member contracts to be liable for the *pro rata* payment of all such losses, as well as to receive compensation for losses which he may sustain. Only the property of its members is insured. The members of the company under the charter consist of all persons holding policies of insurance and who subscribe their names to the copy of the charter and the by-laws of the company. Section 14 provides that every applicant for insurance shall sign his or her name to the application, to which a copy of the charter and by-laws of the company shall be attached, and, in case a policy shall be issued on such application, the said applicant shall thereby become a party to the contract for insurance, and be subject to all the conditions and provisions of the charter and by-laws of the company.

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The plaintiff does not claim that it complied with the charter of the company, but says it took an assignment of the policy at the time it purchased the property covered by the policy, gave no notice of such assignment to the company, and did not in any manner comply with the provisions of section 26 of the charter above quoted, and never, in fact, either made application to become a member of it, or obtained the consent of the company to the assignment of the policy; but claims that its agent paid the assessments which the company made for losses, notice of such assessments having been given to Mary Withers. So we think the sole question that the plaintiff presents is whether or not its payment of such assessments, through its agent, to a director and collector of the company, under the circumstances above stated, amounted to a waiver of the provisions of the charter of the company rendering such policy void upon the sale of the property. Could the plaintiff by merely taking an assignment of the policy, without its contracting in any way to become responsible for any of the losses which other members of the company might sustain, claim in this action that such other members shall pay for losses which it sustains? If the plaintiff had taken its policy to the secretary of the company and had obtained consent to the assignment thereof, then it would have become a member of the company, and be liable for its *pro rata* share of all losses which the company sustained. It did not do this. It simply took the assignment of this policy, permitted the company to go along and treat Mrs. Withers as liable under the charter for her *pro rata* share of the assessments, and now claims that because of the statements to Mr. Marsh, and the payment by plaintiff's agent of the assessments against Mrs. Withers it is entitled to recover.

Let us look at this case for a moment from another point of view. Suppose, instead of plaintiff having had a fire loss, there had been a great conflagration and destruction of property owned by members of the company, such as occurred in some of the counties in this State re-

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cently, and the defendant had undertaken to enforce liability against the plaintiff as a member of this company, would the plaintiff have been held to be a member of the company, and liable for such assessments? We think not, because the charter provides how persons may become members of the company. There was no contract relation whatever between this plaintiff and this company whereby this plaintiff became a member of it at all. The contract must be mutual, and the plaintiff must be equally liable for the losses of other members of the company before it can claim that the other members of the company shall be assessed to pay its losses. Members only are liable to assessment. 2 May on Insurance (4th Ed.), § 553, p. 1290. The rights of the parties are reciprocal.

In general, it may be said that the agents and officers of companies organized with a capital stock divided into shares have greater powers in determining what shall be the terms of the contract, and in waiving a compliance with its stipulations, than those of companies organized on the mutual principle, in which the charter and by-laws are made to fix and regulate every policy as to rights of the insurer and assured alike. Mutual insurance is essentially different from stock insurance, and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies. And it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires from them towards himself. When the company has once determined the forms in which its policies shall be made, and the conditions upon which it is willing to contract, it is nothing less than a violation of duty for the officers to undertake to bind the companies they represent by other or inconsist-

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ent contracts, parol or otherwise. Hence, where the by-laws of a company provide that subsequent insurance obtained, and subsequent alterations made, without the consent in writing of their president, shall avoid the policy, the verbal consent of the president is unauthorized. Nor, when the by-laws require that the premium shall be paid before the policy shall take effect, has any officer the power to bind the company by an agreement that, notwithstanding the nonpayment of the premium, the policy shall be effective. This rule is applicable only to by-laws which are of the essence of the contract. 1 May on Insurance (4th Ed.), § 146, and cases there cited. 19 Cyc. pp. 633, 634, 635:

"Most policies contain a provision that they are not assignable without the consent of the insurer, and they frequently provide the mode in which such consent shall be manifested. Such provisions are valid and accomplish the purpose intended, so that the assignee acquires no privity with the insurer unless such consent be obtained. * * * If there is nothing in the policy giving consent in advance, a consent must actually be given at or subsequent to the time of the assignment to invest the assignee with rights against the insurer. If a certain method for obtaining consent to an assignment of the policy is prescribed in the policy itself, no other mode will suffice. And a forfeiture takes place, if it be provided that such will be the effect of an assignment without the insurer's consent. * * * When the assignment has been completed and the consent of the insurer obtained, a new and independent contract has arisen by which the assignee acquires all the rights of the assignor"— citing numerous cases.

In *Excelsior Foundry Co.* v. *Assurance Co.*, 135 Mich. 474 (98 N. W. 11, 3 Am. & Eng. Ann. Cas. 707), Chief Justice MOORE quotes with approval the following language from Ostrander on Fire Insurance (2d Ed.), at page 245, § 77:

"The character of the hazard being established to the satisfaction of the insurer, its next concern is that no material change shall take place without its consent; and

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this, too, is provided for by the terms of the policy. The insurer cannot watch its many ventures. They are often remote and widely scattered, and besides, too, the greatest dangers that menace property are those that are frequently hidden from public scrutiny. The only practicable plan, therefore, of preserving the status of the risk, is to make the validity of the policy depend upon the insurer being informed of any material changes made, and its consent obtained. In most cases the insured is constantly apprised of the situation of his property, while the company which has assumed the whole responsibility in case of loss has its office in a distant city, and is entirely without the means of information. The necessities of the case are apparent, and the requirements contained in the policy in regard to notice and consent are reasonable, and will be enforced by the courts with strictness."

The principle which lies at the foundation of mutual insurance and gives it its name is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company and the participation of each member in the profits and losses of the business in proportion to his interest. *Huber* v. *Martin*, 127 Wis. 412 (105 N. W. 1031, 1035, 3 L. R. A. [N. S.] 653, 115 Am. St. Rep. 1023, 7 Am. & Eng. Ann. Cas. 400).

It is contended by defendant's counsel that under the decisions in this State in the case of a policy of insurance issued by a stock company even, under the testimony in this case, the facts would not warrant the conclusion that the company had waived any of the provisions of the policy, and that they certainly would not constitute a waiver of the terms of a policy of a mutual insurance company like this—citing *Security Ins. Co.* v. *Fay*, 22 Mich. 467 (7 Am. Rep. 670); *New York Central Ins. Co.* v. *Watson*, 23 Mich. 486; *Reynolds* v. *Insurance Co.*, 36 Mich. 131; *Western Mass. Ins. Co.* v. *Riker*, 10 Mich. 279; *Cleaver* v. *Insurance Co.*, 65 Mich. 527 (32 N. W. 660, 8 Am. St. Rep. 908); *Robinson* v. *Fire Association*, 63 Mich. 90 (29 N. W. 521); *Allemania Fire Ins. Co.* v. *Hurd*, 37 Mich. 11 (26 Am. Rep. 491).

On the part of the plaintiff, it is claimed that what oc-

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curred between Mr. Withers and Mr. Marsh amounted to a waiver by the company of the necessity of the written consent of the secretary to the assignment of the policy. Viewing the testimony in its strongest light against the defendant, we are unable to find any wavier or any conduct on the part of Marsh which misled, or in any manner deceived, the plaintiff, or any conduct to the prejudice of the plaintiff. The plaintiff's agent, with full knowledge of the fact that the assessment had been made against Mrs. Withers, saw fit to pay it. It was the duty of Mrs. Withers to pay the assessment until such time as she surrendered her policy for cancellation. The mere remark of Mr. Marsh that there had been neglect may have meant as well the neglect to surrender the policy on the part of Mrs. Withers, or the neglect of the plaintiff to do the necessary thing to make it a member of the defendant company, as any neglect of the defendant. In speaking of mutual fire insurance companies, this court well said in *Wardle* v. *Townsend*, 75 Mich. 392 (42 N. W. 952, 4 L. R. A. 511):

"The rights and obligations of the individual members are mutual, and each sustains a double relation to the corporation. As an assured he is entitled to be indemnified for his loss insured against by the corporation. As a member of the corporate body he, in consideration for this indemnity, agrees with the corporation, and with each member of the corporate body, to pay his just share or proportion of all losses, so that each member shall receive the same indemnity, and shall also pay his share of the expenses."

Parties taking insurance in a mutual company under a charter like that we are here considering, take it subject to the charter and by-laws of the society. Such a provision as section 26, providing that insurance shall cease upon the sale or transfer of the property insured, operates *ipso facto* to determine the connection between the society and the grantor, and to forfeit his rights as such member. And we know of no case in which the grantee can become a member except by compliance with the provis-

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ions of the charter and by-laws. We are unable to find in this case that the plaintiff did anything to become a member of this company. It is not claimed that the policy was ever presented to Mr. Marsh. Had it been, another question would be before us.

Perhaps plaintiff did not desire to become such member, and incur the legal liabilities of such relation. Certainly the insurance ceased as to Mrs. Withers when she conveyed. Simply assigning the policy did not revive it. A further thing was necessary to be done, namely, to present the policy thus assigned to the secretary, make application to become a member of the company, and get the consent of the secretary indorsed thereon. Thereupon the assignee would have become a member of the company, and would have stood in the shoes of the original holder of the policy. The assessment was made against Mrs. Withers as it well might be made until the policy was surrendered and canceled; and mere payment of such assessment would not make the policy valid in the hands of the plaintiff, or constitute it a member of the company. There was no privity of contract between the plaintiff and the defendant, and the plaintiff cannot make a contract by estoppel based simply on its own neglect. The only waiver or estoppel that is claimed is that Mr. Marsh, the collector and one of the directors of the company, accepted payment of the assessment made against the grantor from William E. Withers, who says he was acting as agent of the plaintiff. We think the point is well made that Marsh neither as a director nor collector had power to bind the company by any conduct that would amount to a waiver. The charter nowhere gives to a single director any such power. The directors when convened as a board can act, and not otherwise. There is authority to the effect that members of the board cannot bind the company they represent, except in regular or special meetings of the board. Knowledge even of the agent or collector was not notice to the defendant company. His duties were to collect and remit assessments. *Larkin* v. *Modern Woodmen of*

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America, 163 Mich. 670 (127 N. W. 786); *Brown* v. *Great Camp K. O. T. M. M.*, 167 Mich. 123 (132 N. W. 562); *Grand Lodge A. O. U. W. of Connecticut* v. *Burns* (Conn.), 80 Atl. 157. In no view of the case which we are able to take was the plaintiff entitled to recover. This renders it unnecessary for us to discuss the question whether or not the plaintiff had a standing in the courts of this State without having complied with the laws thereof, relating to foreign corporations doing business therein.

The judgment of the court below is affirmed.

MOORE, C. J., and STEERE and BROOKE, JJ., concurred. OSTRANDER, J., concurred in the result.

CRANE v. ROSS.

1. EVIDENCE—PAROL TESTIMONY—CONTRACT IN WRITING—BROKERS—EXCHANGE OF LANDS.

   Since parol evidence tending to contradict the terms of a written instrument is incompetent, defendant was erroneously permitted to show, in a suit by a broker for commissions in effecting exchange of real estate, that a contract in writing between defendant and a purchaser secured by the broker, was not a final agreement.

2. SAME—COMPROMISE AND SETTLEMENT—OFFER TO ADJUST.

   An offer of defendant to pay plaintiff a certain amount in settlement of the brokerage commissions was incorrectly admitted and constituted prejudicial error when it appeared that a verdict for the exact amount of the offer was rendered without other evidence to sustain it.

3. SAME—TRIAL—ARGUMENT OF COUNSEL—POVERTY OF DEFENDANT—SYMPATHY.

   Testimony that defendant's property was covered by a heavy mortgage indebtedness, accompanied by reference on the

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part of his attorney to the fact for the purpose of arousing sympathy of the jury, was prejudicial.

4. TRIAL—ARGUMENT—SAVING QUESTIONS FOR REVIEW—EXCEPTIONS.

Exceptions to argument of counsel made without calling on the trial court for a ruling thereon are not reviewable.

5. BROKERS—JOINT DEFENDANTS—HUSBAND AND WIFE—DIRECTING VERDICT.

Testimony having a tendency to show that a wife knew that her husband assumed to act for her in placing property of the wife in a broker's hands and acquiesced in the arrangement, and was shown a copy of the contract of exchange finally entered into with a purchaser, required the submission to the jury of her liability for commissions.

Error to Washtenaw; Kinne, J. Submitted December 11, 1911. (Docket No. 37.) Decided March 12, 1912.

Assumpsit by George C. Crane against George A. Ross and Mildred E. Ross for broker's commissions. A judgment for plaintiff against defendant George A. Ross for less than the amount claimed, and for defendant Mildred E. Ross on a directed verdict, is reviewed by plaintiff on writ of error. Reversed.

Frank A. Stivers, for appellant.

Arthur Brown, for appellees.

STONE, J. This is an action of assumpsit to recover certain commissions claimed to be due the plaintiff from the defendants in effecting an agreement for an exchange of real estate. The defendants are husband and wife. The lands which the plaintiff claims he was to dispose of for the defendants belonged to Mildred E. Ross, and were located in St. Clair county. The parties to this suit all resided in Ann Arbor, where the defendant George A. Ross was a student in the University of Michigan.

It is the claim of the plaintiff that the lands to be disposed of for the defendants were of the value of $11,000, and that his commission for effecting an exchange was to

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be 2 per cent. of the value; that the prospective purchaser was a Mr. Youngs of Toledo, Ohio; that plaintiff and defendant George A. Ross made two trips to Toledo to see Mr. Youngs, and that Mr. Youngs went with the plaintiff and defendants to St. Clair county, and examined the Michigan lands proposed to be exchanged for property in and near Toledo. It is the further claim that the plaintiff and defendant George A. Ross, after previous negotiations, went to Toledo on Sunday, October 11, 1908, and that the plaintiff there brought about, and was instrumental in effecting an agreement in writing between defendant Mildred E. Ross and Frank O. Youngs, which agreement was as follows:

"This contract made between Mildred F. Ross, of Ann Arbor, Mich., party of the first part, and Frank O. Youngs, of Toledo, Ohio, party of the second part, on October 11, 1908, to bind both first and second parties in the sale of certain prescribed lands in Michigan, St. Clair County, Lynn township, owned by party of the first part. East half southwest quarter section 20–9–13, 80 acres. Southeast quarter, section 20–8–13, 160 acres. East half northwest quarter, section 20–8–13, 80 acres. West half of west quarter, section 20–8–13, 80 acres. Northwest quarter, section 32–8–13, 160 acres. Five hundred sixty acres more or less. Party of the first part agrees to surrender abstracts for above described lands for the consideration of the following pieces or parcels of land, and the sum herein described on condition also to be described. One house and lot 160 Potter's addition. No. 440 St. Louis St., Toledo, Ohio. Encumbrance of $500 (five hundred dollars). Northwest quarter, section 19, range 9, twp. 7, Swanton twp. Northeast quarter, section 19, range 9, twp. 7, Swanton twp. Eighty acres more or less. One hundred and fifty $150 enc. Second party agrees to surrender all abstracts and titles for both properties and in addition the sum of $3,650.00, three thousand six hundred and fifty dollars. The transfer to be made under the following conditions. To take place April 1, 1909 or thereabouts. First party agrees to let the money $3,650.00 three thousand six hundred and fifty and 00–100 on notes secured by mtg. at 5 per cent. interest one thousand dollar $1,000 notes. To read payable on or before three years

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from date, April 1, 1909, second party must then pay at this time (three years) at the rate of one thousand dollars or more each year until fully paid. Then seed and labor to be settled by the vacator.

"F. O. YOUNGS.
"MILDRED F. ROSS.
"Per G. A. Ross."

The declaration in the case consisted of three counts. In the first count the material allegations are, in substance, that the defendants employed the plaintiff to procure a purchaser for, or to negotiate an exchange of, certain lands belonging to defendant Mildred E. Ross, and promised to pay him therefor $220; that, in consideration thereof, the plaintiff did procure such purchaser, and did negotiate a sale and exchange of said property for certain lands in the State of Ohio belonging to one Mina Youngs; and that defendants are indebted to plaintiff for said commissions. In the second count the material allegations are the same as those contained in the first count, except that, in addition, defendant George A. Ross is alleged to be the husband and agent of the defendant Mildred E. Ross, and that defendants promised to pay plaintiff for his services the usual and customary commissions in such cases, the same being 2 per cent. upon $11,000, the agreed valuation of the property to be exchanged. The third count is in the usual form of the consolidated common counts in assumpsit.

To this declaration the defendants pleaded the general issue, and gave notice thereunder that if plaintiff acted as agent or broker of defendants, or either of them, for the sale or exchange of any property, the efforts of plaintiff amounted to nothing more than the making of the contract between F. O. Youngs and said defendants, or one of them, and that said contract was made on Sunday, October 11, 1908, and was therefore wholly void, and that the same was never thereafter ratified or affirmed by either of said defendants, that Mildred E. Ross was a married woman, and that said contract was not made in respect to

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her separate estate or property, and that the plaintiff was the agent of the said Youngs, which fact he did not disclose to the defendants. At the close of the testimony the trial court directed a verdict in favor of the defendant Mildred E. Ross, and permitted the case to go to the jury as to the defendant George A. Ross, which resulted in a verdict and judgment for the plaintiff against George A. Ross alone for $25.

There is great conflict in the testimony, the parties being far apart in their claims as to what the real transaction was between them. The plaintiff has brought the case into this court and has assigned numerous errors; a part of them only being discussed by appellant.

The following testimony in the examination of the defendant George A. Ross, in his own behalf, is made the basis of the third, fifth, and seventh assignments of error:

"*Q.* At the time that you drew up this memorandum or agreement (being the agreement heretofore set forth), did you understand that you were making an agreement upon which final action was to be taken, that you were making something that was final and binding upon both parties?

"*Mr. Stivers:* I object; that is calling for a conclusion. What was done is competent, and not what was in his mind, what his understanding was.

"*Mr. Brown:* I don't want his opinion, but what he intended.

"*Q.* Was it understood between you that you were ultimately going to trade places on the basis of that memorandum?

"*Mr. Stivers:* Witness can testify to what was said and done, but not to any understanding about it.

"*The Court:* There may be some doubt about it. I am disposed to allow him to state whether he regarded that as the terms upon which they were to deal. I think he may answer.

"(Exception for plaintiff.)

"*Q.* Did you understand at that time that this little memorandum consisted of all the terms upon which you were to exchange your properties?

"*Mr. Stivers:* The same objection. It is incompetent and immaterial.

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"*Q.* Did it contain the elements of the transfer?

"*A.* No.

"*Mr. Stivers:* I move to strike out the answer because it is a conclusion of the witness and is not the best evidence of what happened there.

"*The Court:* I think he may state the entire transaction, and, if it was not all embodied in the writing, he can show what was left out.

"(Exception for plaintiff.)

* * * * * * * * * * *

"*Q.* Did the time ever come in your negotiations with Mr. Youngs when you and Mr. Youngs were agreed upon the terms of the transfer?

"*Mr. Stivers:* The same objection. That is a conclusion for the court and jury. I have no objection to any conversation or transaction, but I do object to the conclusion of the witness.

"*The Court:* I think he can state whether they ever reached an agreement.

"*A.* No; we never reached a final agreement.

"*Q.* Did Mr. Youngs and Mrs. Ross and her mother ever come to a final agreement about the transfer of that property?

"(The same objection and ruling as above.)

"*A.* No, sir.

"*Q.* In this letter of January 17, 1909, what does he mean when he (Youngs) says he is glad to know you are not willing to foreclose on the tenant?

"*Mr. Stivers*: I object. It is incompetent, immaterial, and irrelevant.

"*The Court*: He can state what he had reference to.

"(Exception for plaintiff.)

"*Q.* What had he reference to?

"*A.* Mrs. Ross holds a mortgage of I think $270.

"*Q.* On his personal property?

"*A.* Yes."

This related to a mortgage held by Mrs. Ross upon some personal property of the tenant in possession of some of Mrs. Ross' lands in question.

"*Q.* I ask you again whether you and Mr. Youngs ever came to a final agreement about that trade and exchange of these parcels?

"*A.* No; we did not.

"*Mr. Stivers:* I object. It is immaterial, and calls

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for a conclusion. It has been gone over once. I move to strike out the answer.

"*The Court:* I deny the motion.

"(Exception for plaintiff.)"

The following testimony is made the basis of the fourth assignment of error. It appears in the testimony of the same witness in which he is testifying of the plaintiff, as follows:

"All he was doing was puttering around on a 10-acre lot up there, and he was not doing much of anything that I could see, so I figured up what his expenses would be, and it came to approximately $10 even for the day he went down to Toledo on his own business, as he reported to me that day he went up to Imlay City, and Sunday he went to Toledo again. I figured that about $5 a day, that made $25. I deposited $25 in the bank, and notified Mr. Stivers if Mr. Crane wished to accept it that it was there for him, but he refused it.

"*Q.* That was after the suit had been commenced?

"*A.* Yes.

"*Q.* And you did that for the purpose of compromising the matter?

"*A.* Certainly.

"*Q.* You expected if he took that, it would prevent litigation, did you?

"*Mr. Stivers:* That calls for a conclusion.

"*The Court:* He can state why he made the tender.

"*Q.* You gave him a written notice at that time, didn't you?

"*A.* Yes.

"*Q.* And in that written notice you stated in terms what it was for?

"*A.* Yes, sir.

"*Mr. Brown:* Will you give us that written notice?

"*A.* I gave that money to Mr. Brown, and he put it in the bank and sent notice to Mr. Stivers.

"*Mr. Stivers:* I object to any further testimony on that. It is immaterial.

"(Objection overruled. Exception for plaintiff.)

"*Q.* I show you paper marked 'Exhibit D,' and ask whether that is the notice?

"*A.* Yes, sir.

"*Mr. Brown:* I offer that in evidence.

"*Mr. Stivers:* I object. It is incompetent and imma-

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terial, and a transaction that occurred after the commencement of suit and was an effort to compromise, and it is not competent. I withdraw the statement that suit had been commenced, but I object upon the ground that it was an effort at compromise, and as not tending to prove or disprove the claim of the plaintiff."

Exhibit D was read against the objection. Exception for plaintiff. Exhibit D was as follows:

"ANN ARBOR, MICH., January 29, 1909.

"To MR. FRANK A. STIVERS:

"*Dear Sir:*

"In the matter of the claim of George Crane against George Ross, I have to inform you that Mr. Ross has caused to be delivered to Michael J. Fritz, a check for the sum of $25.00, to be delivered to you as attorney for Mr. Crane, or to Mr. Crane himself, when either of you deliver to him a receipt in full of all demands against Mr. Ross or any of his family. Mr. Ross does not recognize any claim of Mr. Crane in making this tender, but does so with the view to avoid any trouble with Mr. Crane.

"Truly yours,

"HORATIO J. ABBOTT,

"For Mr. Ross and Family."

The following testimony of defendant George A. Ross upon his direct examination is made the basis of the sixth assignment of error:

"*Q.* Something was said about the title to that property up there that you speak of. Is the property that you referred to up in the northern part of the State free from incumbrance, or is it heavily mortgaged?

"*Mr. Stivers:* I object. It is immaterial.

"*The Court:* Is that important?

"*Mr. Brown:* Yes. They have brought out that there was a vast amount of property up there. That was to get before the jury, and give the impression that these people were wealthy, and it is to counteract that.

"*Mr. Stivers:* I take exception to that.

"*The Court:* We will take the answer.

"(Exception for plaintiff.)

"*A.* It is heavily incumbered. Mrs. Ross has all the details of it. I know it amounts to thousands of dollars, something like $10,000. I do not know the exact figures."

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The tenth assignment of error is to the effect that there was prejudicial error in the argument of defendants' counsel to the jury, and that the court erred in not correcting the error after plaintiff's exception to same.

The ninth and eleventh assignments of error are to the effect that the court erred in directing a verdict for defendant Mildred E. Ross.

1. We shall consider together, as counsel have argued them, the third, fifth and seventh assignments of error. There was no claim on the part of the defendant George A. Ross that the agreement made at Toledo, Ohio, as above set forth, was not a completed instrument and delivered to Mr. Youngs; for he testified that he himself carried a copy of it home, and showed it to his wife. We think that the testimony of this defendant here complained of was objectionable, in that he undertook to give the meaning and effect of this agreement, and to show that the minds of the parties had not met. This is not a suit to correct the instrument. We think the paper should have been permitted to speak for itself, and that that portion of the testimony here objected to was incompetent; and, further, it called for the conclusion of the witness, and was an effort by parol testimony to alter and change the terms of the written document. We are of opinion that the court erred in admitting this testimony. It was an effort on the part of the witness to give his opinion as to his legal liability under the contract, an opinion with which the jury had no concern. *First Nat. Bank of Sturgis* v. *Reed*, 36 Mich. 263-266; *Zube* v. *Weber*, 67 Mich. 52 (34 N. W. 264); *Althouse* v. *McMillan*, 132 Mich. 145 (92 N. W. 941). Were this the only error in the record, we should not think it our duty to reverse the judgment.

2. Coming to the fourth assignment of error, it appears that the defendant George A. Ross was permitted to testify as to his proposal to compromise with the plaintiff for $25; and against the objection and exception of the plaintiff the written offer of defendant's agent to this effect

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was introduced in evidence. By reason of counsel not having complied with the rules of this court in giving the date of the filing of the declaration, we are unable to say from the record whether this letter was written before or after commencement of suit. In either case we think it was objectionable. It is worthy of note that the amount offered in this letter was the amount of the verdict of the jury. Aside from this testimony, there is nothing in the record to indicate the basis for the verdict of the jury as a suitable measure of damages. This court has repeatedly held that the admission in evidence of such attempts to compromise a suit is reversible error, and we think in this case that it was prejudicial error. *Chandler* v. *Allison*, 10 Mich. 460; *Montgomery* v. *Allen*, 84 Mich. 656 (48 N. W. 153); *Fox* v. *Barrett's Estate*, 117 Mich. 162 (75 N. W. 440); *Walbridge* v. *Barrett*, 118 Mich. 433 (76 N. W. 973); *Musselman Grocer Co.* v. *Casler*, 138 Mich. 24 (100 N. W. 997).

3. The sixth assignment of error is based upon the ruling of the court in permitting defendant George A. Ross to testify to facts disclosing a large indebtedness of the defendants, and also for what is claimed to be a prejudicial remark of defendants' counsel in reference thereto. We are clearly of the opinion that this testimony was immaterial and irrelevant to the issue. Its tendency was to arouse sympathy in the minds of the jury, especially in connection with the remarks of counsel, and we think the court erred in admitting it.

4. The tenth assignment of error relates to certain alleged prejudicial argument of defendants' counsel in addressing the jury. Counsel for plaintiff contented himself with taking exceptions to particular portions of the argument of defendants' counsel without asking for, or obtaining, a ruling thereon by the court. Under repeated rulings of this court, such exceptions cannot be considered. In the late case of *People* v. *Sartori*, *ante*, 308 (134 N. W. 200), the more recent decisions of this court upon this subject have been collected. We have examined the

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record with care upon this matter, and it appears that plaintiff's counsel made no request of the court to restrain counsel; did not ask the court in any way to advise the jury as to the claimed impropriety of the language, or to direct their attention to the fact that the language was not justified. No request was made that counsel be reprimanded by the court, or that the remarks complained of should be stricken from the consideration of the jury. Clearly, under such circumstances, the exceptions cannot be considered.

The only remaining assignments of error argued by counsel for appellant in his brief are the ninth and eleventh, which relate to the direction of the verdict for the defendant Mildred E. Ross. After a careful reading of this record, we have reached the conclusion that there was evidence tending to show that defendant Mildred E. Ross had knowledge of the agreement between George A. Ross, her husband, and the plaintiff relating to the sale or exchange of her property, and that she acquiesced therein, and that her husband had assumed to act for her respecting her property, with her knowledge and consent. The evidence was undisputed that she knew of the making of the Toledo contract, and that her husband had shown her a copy of it. This being so, we are of opinion that the court erred in directing a verdict in her favor. The case should have been submitted to the jury as to both defendants.

For the errors pointed out, the judgment of the circuit court is reversed, and a new trial granted.

MOORE C. J., and STEERE, BROOKE, and OSTRANDER, JJ., concurred.

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HALL *v.* DUPLEX-POWER CAR CO.

1. SALES—WARRANTY BY IMPLICATION—CONTRACTS—EXPRESS AS EXCLUDING IMPLIED WARRANTY.

   In an action for breach of an implied warranty of motor trucks, which proved to be worthless, any implied warranty of fitness was excluded by clauses in the written contract of sale providing for prompt replacement of all defective parts, and requiring the purchaser to make all claims on account of defective equipment not made by the seller to the respective manufacturers of such portions.

2. SAME—PAROL EVIDENCE RULE.

   Evidence of an express warranty, not included in the writing, was incompetent.

3. SAME—FRAUD—FALSE REPRESENTATIONS—TRADE TALK—OPINIONS.

   Evidence that the vendor told plaintiffs, who were inexperienced in handling motor trucks, that the cars had passed the experimental stage, that they were the best made and would do good work, and that the representations were false and induced plaintiffs to enter into the contract, tended to establish more than trade talk and warranted the submission to the jury of the question of fraud.

4. SAME—EVIDENCE.

   All evidence, tending to prove that the trucks were not practicable and saleable as commercial machines, was competent evidence upon that issue.

Error to Eaton; Smith, J. Submitted December 15, 1911. (Docket No. 131.) Decided March 12, 1912.

Assumpsit by Eugene Hall and Clarence M. Hall, copartners, against the Duplex-Power Car Company for damages for fraud and breach of warranty. A judgment for defendant on a verdict directed by the court is reviewed by plaintiffs on writ of error. Reversed.

Elmer N. Peters, for appellants.

Frank A. Dean, for appellee.

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STONE, J. The defendant is a Michigan corporation, and on November 27, 1909, was engaged in the business of manufacturing and selling automobile trucks, or motor trucks, at the city of Charlotte. The truck manufactured by the defendant is what is termed a "four-wheel drive;" that is to say, the power to drive the truck applies to all four wheels. On the day above stated the defendant entered into a contract with the plaintiff Eugene H. Hall for the manufacture and sale to him of two delivery cars and one passenger station car for the sum of $2,925. Under this contract the cars were to be delivered to the purchaser f. o. b. cars at Charlotte, Mich., not later than December 10, 1909. At the same time the defendant entered into what is termed a sales agency contract with said plaintiff, in which certain territory was assigned to the latter, in which he was to represent the defendant in selling the auto trucks manufactured by defendant. The seventh and eighth clauses of said last-named contract were as follows:

"(7) That all claims on account of defective construction or material must be made by the party of the second part within sixty days after the delivery of the automobiles, and upon such parts being submitted to the party of the first part they will make prompt replacement, gratis, if upon examination by the party of the first part they are found to be defective. Freight and express charges on all parts returned to the factory for credit or replacement shall in all cases be prepaid.

"(8) That all claims on account of defective equipment not manufactured by the party of the first part shall be made by the party of the second part to the respective manufacturers of such portions of equipment, and not to the party of the first part."

At the time these contracts were entered into, the three cars contracted to be sold were in the course of construction. The plaintiff Clarence M. Hall was the partner of plaintiff Eugene H. Hall, in this transaction, and defendant's officers knew that both plaintiffs were interested in the contracts as partners. Five hundred dollars were

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paid down on said November 27th, and on December 10, 1909, a further payment of $1,500 was made on the purchase price, and a note of $925 was given for the balance, signed by both plaintiffs. The trucks were delivered on board cars at Charlotte, Mich., on or about December 10, 1909, and were shipped to Kansas City, Mo.

The plaintiffs gave evidence tending to show the following facts: That they were entirely inexperienced in the matter of driving, using, or handling motor cars of any description, and were entirely inexperienced in the matter of selling automobiles and automobile trucks; and that these facts were well known to the defendant's officers who negotiated the sale. The defendant's officers also knew, at the time of the contracts, where the trucks were going, and that they were to be used as demonstrating cars, to enable plaintiffs to take orders and make sales of other cars. Upon the arrival of the cars at Kansas City, they were unloaded and placed for storage and exhibition with the International Garage Company of that city, which was a suitable location. Although the plaintiffs were inexperienced, and known to be so, in handling the cars, they employed competent and experienced men for that purpose, one of whom was a man recommended to them by defendant's officers. It was the claim of the plaintiffs, and testified to, that the cars proved to be absolutely worthless for the purposes for which they were manufactured and sold; that they proved to be so faulty and poorly constructed and assembled that it was impossible to keep any one of them running a sufficient length of time to make a successful demonstration, or to effect a sale; that the workmanship throughout, in the matter of assembling, was so crude and unskillful as to render the machines valueless. There are a number of letters in evidence showing that plaintiffs kept defendant fully advised as to the situation, and of the fact that the cars were not standing up, but were defective. Within 60 days from the delivery of the cars to the plaintiffs, they returned from Kansas City to Charlotte, and went personally to

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the officers of the defendant, and reported to them fully their troubles with the cars, and that they had become satisfied that the cars were absolutely worthless, and attempted to get a settlement, but were unable to do so, and thereafter brought suit.

The declaration contains four counts, three of which were based upon an alleged breach of an implied warranty, and one being for fraud and deceit. The plea was the general issue. At the trial, and before any evidence was introduced, counsel for defendant objected to the introduction of any evidence, because it appeared from the contracts, which were set up in the declaration, that there was no warranty, and that the alleged representations were not such as could be made a basis of an action for fraud and deceit. The court admitted the evidence at the time, but ruled later in the trial that the plaintiffs could not recover upon the ground of breach of warranty, in view of the seventh and eighth clauses in the contract above set forth, but allowed the evidence to go in, under the count for fraud and deceit. When the plaintiffs rested their case, counsel for defendant moved the court to instruct the jury to render a verdict for the defendant, upon the ground that the evidence on behalf of the plaintiffs would not warrant a recovery for fraud and deceit, and that plaintiffs' proofs failed to make out a case. The court thereupon directed a verdict for the defendant, and a judgment in its behalf followed.

The plaintiffs claim that there was ample evidence upon the question of fraud and deceit to have carried the case to the jury. In this connection they call attention to Exhibit A, which shows cut of Model A, Duplex-Power Cars, and the following printed matter:

"You can pay more but you cannot buy another delivery in America that can be depended upon to run the year 'round through mud, slush, and snow.

"This car will do more work than 2 horse-drawn rigs; with one less driver, costs less to maintain; quicker deliveries, well pleased customers. More of them.

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"A ten-passenger bus that you won't have to leave in the garage because of the mud or snow. Artillery wheels if you prefer them.

"This is the 1,000 lb. capacity car that beat two double teams 4½ hours in a day's laundry delivery. Making a total of 115 miles on 9½ gallons of gasoline.

"Not a car offered for sale until they had made good on every kind of road in this country and they never flunked.

"Remember, these cars are not assembled jobs, simply put up to sell to people who do not know the difference, but they are manufactured in our own plant, where nothing but commercial cars are built, by men who gave their entire time and thought to the construction of the best commercial cars ever produced in America."

Upon that subject the plaintiff Eugene H. Hall testified as follows:

"I think Exhibit A is the circular or part of the literature shown me at the time that we were negotiating for this purchase. We closed the contract with F. A. Messler, who represented the defendant company. He was secretary at that time; there were representations made to me as to these machines and as to whether they had been tested, quite a good many. The representation was that they harmonized with their literature and that they were the best that were made. They represented them to be the best cars that possibly could be made; they were satisfied in their own mind they would do what other cars would not do, do great stunts; that they demonstrated to us what they could do with the cars.

"*Q.* Any representations made as to the quality of the material in the cars?

"*A.* Yes, sir; I was down through their basement where they were cutting gears, and they represented everything was of first-class quality that could be obtained.

"*Q.* As to the matter of workmanship?

"*A.* That they employed only skilled workmen to assemble cars."

In response to the question, "Was there anything said whether these cars had been perfected, or that they were in condition to be placed on the market?" he testified:

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"I know that was the climax, that they claimed they had passed their stage of experiments." On cross-examination this plaintiff testified:

"*Q.* You knew it was something of an experiment even at that?

"*A.* No; it was represented to me that it had passed its stage of experiments. * * *

"*Q.* What was it that they said to you that deceived you?

"*A.* Well, they left me to believe it was past the experimental stage, and by these experiments we had with it there, it proved to be an utter failure, a complete failure.

"*Q.* Is that all they said or did to you that misled or deceived you?

"*A.* That covered the whole proposition made, yes.

"*Q.* That is every statement they made that misled you, is it?

"*A.* The statement was that these cars were perfect in every particular."

This witness further testified that upon his return to Charlotte, and at a conference with Mr. Messler—

"I told him (Messler) at that time that he represented to us that the cars were perfected, and had passed the experimental stage, and were capable of going out and doing all those stunts they were represented to do. He still made those claims. He thought the cars were all right; that it must be us. He never has denied to me that he had made those representations as to the quality of these cars. On the other hand, he claimed that the cars were exactly as represented. We claimed from our experience with those cars, that it was the general assembling of the cars which he had undertaken to put up that was imperfect. The parts we claimed would not work were parts we could not return. We claimed it was the assembling, the general construction of the cars, such as the main shaft being connected together in a manner, there was no part of it we could return here and no part we could send back. We claimed to him that the cars were generally deficient. * * * As I stated on cross-examination it was because of this claim that these cars were absolutely worthless, so fundamentally wrong they were a perfectly worthless thing, that we refused to accept their proposition made to us in writing.

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"*Q.* Did Mr. Messler in making these representations to you merely state his thought or belief that these cars were as represented, or did he state these things as positive facts?

"*A.* He stated them to be positive facts."

The witness Clarence Hall testified to the same effect.

Morris Bollstrom, who was the inventor of the four-wheel drive, and a stockholder in defendant company, testified that he knew the representations made by Mr. Messler regarding these cars: it was that the cars had as a class been brought beyond the experimental stage; that it was certainly represented by him (Messler) that these cars had been developed to the stage that they were a salable machine, and ready to go on the market; that he remembered very distinctly the occasion of the sale of the cars to the plaintiffs; that he was present practically all of the time when the plaintiffs were negotiating with Mr. Messler regarding the transaction; that these cars were not to his satisfaction developed so that they were ready to be placed upon the market; that he protested against making a sale of any of them; that it was a patchwork job made in skeleton form, a little insertion here, a little insertion there, material here and there that was absolutely unsatisfactory to him, either as a sample or straight commercial salable proposition. He further testified that the cars of the class sold the plaintiffs had not stood practical tests in operation and use, and that he knew of their having been returned. There was other testimony to the same effect.

The plaintiffs have brought the case here by writ of error, and they assign error upon certain rulings of the court relating to the admission of evidence, and upon that part of the charge and ruling that the plaintiffs could not rely upon an implied warranty, and upon the direction of the verdict for the defendant.

Upon the subject of implied warranty, we are of opinion that the case is ruled by *Monroe* v. *Hickox, Mull & Hill Co.*, 144 Mich. 30 (107 N. W. 719). We think defend-

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ant's counsel are correct in the claim that there can be no implied warranty when one is expressed; that the undertaking of the defendant to replace promptly all defective parts constituted a warranty within the doctrine of the case above cited. Section 7 of the contract defined the liability of the defendant, and excludes an implied warranty.

Another difficulty with plaintiffs' position upon this branch of the case is that the evidence offered tended to show by parol an express warranty, other than that contained in the contract. This, we have held, cannot be permitted. We find no error in the ruling relating to an implied warranty.

We are of opinion, however, that the court should have submitted the case to the jury upon the question of fraud and deceit, and that it was error to direct a verdict for the defendant. Bearing in mind the nature of the representations testified to, and the entire inexperience of the plaintiffs in handling automobiles of this or any other kind, and the testimony tending to show the falsity of the representations, we must hold that there was sufficient evidence introduced, in support of the count for fraud and deceit, to entitle the plaintiffs to go to the jury upon this question. If it is a fact that these statements were made, and were relied upon by the plaintiffs, and induced plaintiffs to enter into the contract, and were false in fact, it is immaterial whether Mr. Messler believed them true. *Krause* v. *Cook*, 144 Mich. 365 (108 N. W. 81).

We cannot agree with counsel for the defendant that the statements testified to constituted mere "trade talk," and did not amount to material representations relied upon by the plaintiffs. See *Wegner* v. *Herkimer*, 167 Mich. 587 (133 N. W. 623), and cases there cited, bearing upon this subject.

Referring to the assignments of error relating to rulings upon the admissibility of evidence, it is sufficient to say that any competent evidence relating to the representations

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made by defendant's officers to the plaintiffs in the course of the negotiations, and any competent evidence tending to show that at the time of making the contracts in question the cars had not reached a point where they were practicable and salable as commercial machines, was admissible and should not have been excluded.

We do not think that upon another trial these questions will arise, in view of what we have said upon that subject.

For the error pointed out, the judgment of the circuit court is reversed, and a new trial granted.

STEERE, BROOKE, BLAIR, and OSTRANDER, JJ., concurred.

VAN GALLOW *v.* BRANDT.

1. EQUITY—DEMURRER—WAIVER—HEARING.
   Unless a defendant, who demurs to a bill of complaint, presents the points raised to the court by argument or objection, the demurrer is waived by going to a hearing on the merits.

2. EVIDENCE—WILLS—PAROL TESTIMONY TO EXPLAIN TERMS.
   Parol evidence is incompetent to vary or contradict the plain terms of a valid will.

3. SAME—SURROUNDING CIRCUMSTANCES OF TESTATOR.
   But the court may, in interpreting the language and construing the will in case the provisions are contradictory, or the terms ambiguous, consider the circumstances surrounding the testator when he made the will, and to that end may hear oral evidence as to the amount and nature of his property, his personal characteristics, his relations with and disposition towards those designated as objects of his bounty, and similar evidence as to his situation.

4. WILLS—PERPETUITIES—PAROL EVIDENCE RULE.
   Held, that the terms of a will devising property to testator's

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sister, if she survived her husband, and in case of her death during the husband's life, to her children, and if any of them died under age and without issue the share of deceased to go to the remaining children, and providing that it was testator's will to exclude such husband from participation in the estate, were not so ambiguous as to require the aid of parol evidence, and did not violate the statute prohibiting perpetuities. (3 Comp. Laws, § 8797).

5. SAME—CONTINGENT REMAINDERS—VESTED ESTATES.
The law favors the construction of a will, if possible, so as to create vested estates.

6. SAME—PER CAPITA DISTRIBUTION—DEVISE.
As a general rule claimants take *per stirpes* only when they stand in unequal degrees of relationship to testator, and are of different classes, but when they are of equal degree of relationship and of the same class they take *per capita*.

7. SAME—CLASS.
A direction for division of certain specified property between members of a group, share and share alike, is construed as a direction to distribute *per capita*.

8. SAME—DISTRIBUTION—PARTITION.
Under a bill of complaint to construe a will, praying for a partition of decedent's estate, which contained both real and personal property, the court in chancery properly decreed that the probate court should make the distribution and partition in assigning the residue of the estate.

Appeal from Wayne; Hosmer, J. Submitted December 12, 1911. (Docket No. 71.) Decided March 12, 1912.

Bill by Charles Van Gallow and Joseph Van Gallow against Mary Theresa Brandt and others for the construction of a will. From a decree for defendants, complainants appeal. Affirmed.

May & Dingeman, for complainants.

Jay Fuller, for defendants.

STEERE, J. The purpose of complainants' bill is primarily to obtain a construction of the last will and testament of Francis Devroe, who died at Detroit, Mich., on March 14, 1909. Partition of the realty belonging to said

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estate is also sought. The two complainants are children of a deceased sister of testator, Natalie Van Gallow by name, who had been dead 26 years when the will in question was made. It bears date August 9, 1902. Defendant Mary Theresa Brandt is testator's only living sister; the other defendants being her eight children, all over 21 years of age, and C. J. Termote, executor of said estate. Devroe had never married and was well advanced in years at the time of his death. When this suit was instituted, his will had been admitted to probate in Wayne county, and the executor had filed his final account; but owing to the pendency of this litigation the estate has not been distributed. It consists of realty valued at $4,500 and cash on hand, $3,155.70 after deducting all disbursements and expenses. Those portions of the will which give rise to this controversy and have a bearing on this issue before us are as follows:

"*Third.* Upon the death of said Caroline Ramsay I do hereby forever give, bequeath and devise said lot numbered fifty, described in paragraph 2 hereof, to Charles Van Gallow and to the children of my sister Mary Therese Brandt, in equal shares, share and share alike.

"*Fourth.* To Charles Van Gallow, Joseph Van Gallow and the children of my sister Mary Therese Brandt, I do hereby forever give, bequeath and devise, in equal shares, share and share alike, the west lot No. 65 upon which cottage No. 727 north side of Monroe avenue, between Chene street and Joseph Campau avenue, in said city of Detroit, is located, with all improvements thereon.

"*Fifth.* To my sister Mary Therese Brandt (if she survive her husband William Brandt), I hereby forever give, bequeath and devise the east lot No. 64 upon which cottage No. 729, north side of Monroe avenue, between Chene street and Joseph Campau avenue, in said city of Detroit, is located with all improvements thereon. In case my said sister (Mary Therese Brandt) should die before her husband, I hereby give, bequeath and devise forever the premises described in this paragraph five to the children of my said sister (Mary Therese Brandt), in equal shares, share and share alike, intending thereby that my brother-in-law (William Brandt), husband of my

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said sister (Mary Therese Brandt), shall not in any manner whatever participate in my estate; neither as heir of his wife or any of his children, and to that end I do hereby ordain, and it is my will and intent, that in case any one or more of the children of my sister die under age and without issue, that his or her surviving brothers and sisters shall inherit such respective share of any deceased child to the absolute and complete exclusion of its or their father (William Brandt)."

"*Seventh.* The rest, residue and remainder of my estate real, personal and mixed, I do hereby forever give, bequeath and devise in equal shares, share and share alike, to Charles Van Gallow, Joseph Van Gallow and to the children of my sister, Mary Therese Brandt (being my nephews and nieces). The devise and bequests to the Brandt children to be strictly governed and construed by the language, terms and intent as expressed in paragraph five of this my will relating to the absolute exclusion of their father (William Brandt) as if the same were in this paragraph fully repeated."

The record discloses that defendant Mary Theresa Brandt, by her counsel, demurred to complainants' bill—

"Because it appears by said bill that the same is exhibited against this defendant and the several other persons therein named as defendants thereto, for divers distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned."

But she went to a hearing with the other defendants on the merits without urging or arguing the demurrer, and must be deemed to have waived the same. *Payne* v. *Avery*, 21 Mich. 524; *Snook* v. *Pearsall*, 95 Mich. 534 (55 N. W. 459); *Burnham* v. *Dillon*, 100 Mich. 352 (59 N. W. 176).

Upon the hearing numerous witnesses were sworn by both sides, who testified at length, not only as to surrounding conditions, and the relations of testator with his beneficiaries at the time of executing his will, but also detailing various statements and declarations made by him from time to time as to what disposition he intended to make of his property, and what provisions he had made, and proposed

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to make, for his relatives. The announced object of this testimony was to illuminate ambiguities in the will and disclose the true intent of the testator. Objections were interposed at intervals by counsel on both sides, on the ground that the will is not ambiguous and "speaks for itself." We labor under the same uncertainty touching the attitude of counsel in making such objections as seem to have embarrassed the trial judge, who at one stage of the proceedings remarked, "If you are agreed upon that, I will strike out all the testimony;" but there is no record of any testimony having been stricken.

It is elementary that parol testimony is not admissible to contradict, subtract from, add to, or vary the plain terms of a valid will, yet, where the language is obscure or contradictory and the intent of the testator doubtful, the court may, in interpreting the language and construing such instrument, consider the circumstances surrounding the testator when he made his will, and to that end may hear oral evidence as to the amount and nature of his property, his personal characteristics, his relations with and disposition towards those designated as objects of his bounty, and any other extraneous facts of like nature which might tend to disclose the actual situation at the time, to thereby better discover his true intent in the distribution of his property. *Tuxbury* v. *French*, 41 Mich. 7 (1 N. W. 904). While some of the testimony introduced would be admissible for such purpose, we think the will under consideration, read as a whole, furnishes few difficulties and quite clearly discloses the true intent of the testator, free from most, if not all, the ambiguities insisted on by the complainants.

It is complainants' contention that the "fifth" clause of the will is void because it violates the provisions of our statute as to perpetuities, which in part reads as follows:

"The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of two lives in

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being at the creation of the estate." Section 8797, 3 Comp. Laws.

For which reason it is claimed that the property described in said "fifth" clause belongs to the residuary devisees under the "seventh" clause in said will. After reciting and emphasizing the provisions of said fifth clause, counsel for complainants say in their brief:

"Both Mr. and Mrs Brandt are still alive. No conveyance of the fee can be made by Mary Theresa Brandt during the lifetime of her husband; no conveyance of the fee can be made by her children during the lifetime of the father and mother because of the possibility of other children. Assuming that Mrs. Brandt may have another child, the right of Mrs. Brandt to dispose of the fee of the property in question is suspended during the lifetime of William Brandt, and the right of alienation by the children is suspended during the lifetime of their mother, two lives in being, and the minority of such minor child."

Although Mrs. Brandt was 68 years of age at the time of the death of the testator, and all her children past their majority, counsel urge that, for the purpose of determining questions of remoteness, "a possibility of issue is always supposed to exist in law * * * even though the donees be each of them 100 years old," citing Blackstone's Commentaries, p. 125; Gray on Perpetuities, § 215; *List* v. *Rodney*, 83 Pa. 483, and other authorities. Assuming that this mythical, but supposable, offspring of Mrs. Brandt's declining years, may materialize, we cannot conclude that in either contingency specified in the clause under consideration there is outlined a perpetuity in violation of our statute. If there is anything in the will made perfectly clear and placed beyond any possibility of mistake, it is the intent that the brother-in-law, William Brandt, shall not participate in the estate. The peculiarities of the will are the result of a special effort to make that clear. The only beneficiaries under the fifth clause in the will are testator's sister and her children. The children's estate in expectancy, if it goes to them at all, passes upon the death of their mother, not their father. After

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the mother's death the father might live forever and it would not matter. Should he die before his wife, her title in fee simple becomes absolute at once, and the expectancy of the children becomes a nullity. In either event the termination of one life in being frees the estate of all limitations except the possibility of further children being borne by Mrs. Brandt and in that remote event the limitation would not violate the statute. We see no reason why this mother and children, all being of age, acting in conjunction, could not, at any time, convey the whole fee in possession, subject only to the rights of future offspring of Mrs. Brandt.

We think that Mrs. Brandt took an estate in fee simple at the death of the testator subject to defeasance by her death before her husband. It was the manifest intent and first thought of the testator to give this property to his sister, with immediate possession and enjoyment of the same. It had been her home for many years, and he evidently desired to give it to her absolutely, without restrictions or conditions, and would have done so were it not for the husband. To exclude him testator attached certain conditions and limitations which made the devise somewhat indefinite.

"The fee simple is also held to pass by an indefinite devise, where it is succeeded by a gift over in the event of the devisee dying under the age of 21 years; such devise over being considered to denote that the prior devisee is to have the inheritance in the alternative event of his attaining the age in question, since, in any other supposition, the making the ulterior devise dependent on the contingency of the devisee dying under the prescribed age, is very capricious if not absurd." 3 Jarman on Wills, p. 26.

In the case at bar the contingent event is the wife dying before her husband, instead of dying "under the age of 21 years," and instead of it being considered to denote the fact, as in that case, it is positively provided in the case at bar that the prior devisee is to have the inheritance in the alternative event of surviving her husband. The law

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in this State particularly favors vested estates where possible to so construe them. *Toms* v. *Williams*, 41 Mich. 552 (2 N. W. 814); *Rood* v. *Hovey*, 50 Mich. 395 (15 N. W. 525); *Union Mutual Ass'n* v. *Montgomery*, 70 Mich. 587 (38 N. W. 588, 14 Am. St. Rep. 519).

It is further contended by complainants that a proper construction of the fourth and seventh clauses of the will gives to each of them one-third and to the children of Mrs. Brandt, collectively, one-third; or that, taking by representation, they together as children of the one sister (Natalie Van Gallow) are entitled to one-half, the other half to be divided among the eight children of the other sister (Mary Theresa Brandt), the will empowering and requiring a division *per stirpes* and not *per capita*. It is the claim of defendants, and the trial court held, that the import of the instrument is for a division *per capita* between complainants and the eight Brandt children, each taking one-tenth.

While the two complainants are named and the other beneficiaries are described as "the children of my sister Mary Therese Brandt," they are all collectively designated as "my nephews and nieces," and the property is bequeathed and devised to them "in equal shares, share and share alike." If extraneous evidence is to be considered, the deceased seems to have been on equally friendly terms with all his nieces and nephews when he made his will; no reason is disclosed why he should particularly favor the complainants. The repeated use of the expression "in equal shares, share and share alike," is significant, especially in view of the fact that all these beneficiaries were nephews and nieces and in the same class. As a general rule claimants take *per stirpes* only when they stand in unequal degrees to the testator and are of a different class, but when in equal degrees of relationship and of the same class they take *per capita*. *Pearce* v. *Rickard*, 18 R. I. 142 (26 Atl. 38, 19 L. R. A. 472, 49 Am. St. Rep. 755); *Hodges* v. *Phelps*, 65 Vt. 303 (26 Atl. 625).

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The language of the will points to equal distribution and emphasizes that construction.

"A direction for the division of certain specified property between the members of a group, 'share and share alike,' is construed as a direction to distribute *per capita*." Page on Wills, p. 645, and cases there cited.

The circuit court correctly held that under the fourth and seventh clauses of said will each of the nephews and nieces took an undivided one-tenth interest, and that the fifth clause of said will was not in violation of the statute urged against it.

In their bill complainants pray for a partition of the estate according to the respective rights and interests of the beneficiaries and the appointment of commissioners to make a division and partition of the real estate among the parties; also, for a receiver to take charge of the property, with power to collect rents, make repairs, and otherwise manage the estate. In his opinion the circuit judge said:

"So far as the balance of the matters which are involved in this bill are concerned, I think the entire matter must wait until the action of the probate court in assigning the residue."

The formal decree concludes as follows:

"It is further ordered, adjudged, and decreed that a certified copy of this decree shall be filed with the probate court for Wayne county in the estate of Francis Devroe, deceased, forthwith, and that a division of said estate shall be made in accordance with this decree."

Personal property is involved and to be distributed as well as real estate, and we think that under the proofs a proper disposition was made of these questions by the trial court. Should difficulties arise as to a division of the real estate, it can again be brought before the court by supplemental proceedings, when proper action may be taken on the conditions then shown.

The decree is affirmed, with costs in favor of defendants.

MOORE, C. J., and BROOKE, STONE, and OSTRANDER, JJ., concurred.

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BUMAN v. MICHIGAN CENTRAL RAILROAD CO.

1. CARRIERS—PASSENGERS—RAILROADS.
   The relation of passenger and carrier did not exist between a railroad company and one who, intending to purchase a ticket, alighted from an interurban car of another corporation, proceeded several blocks towards defendant's station where he paused outside, gave money to an employé of defendant, not the ticket agent, and requested him to purchase a ticket, when the intending passenger was arrested for being drunk and disorderly, and engaged in a quarrel with the police officer.[1]

2. ARREST—RESISTING OFFICER—EVIDENCE.
   Upon undisputed testimony that plaintiff used foul language to and assaulted an officer, that the officer in the course of the affray repeatedly stated he was trying to arrest the man and called for help, that he told plaintiff several times he wanted to arrest him, told him to come on, and that he requested others to assist in arresting plaintiff, the court should have charged, as a matter of law, that plaintiff was under arrest, and the question should not have been submitted to the jury.

3. MASTER AND SERVANT—PERSONAL INJURIES—RAILROADS.
   Defendant, a railroad corporation, was not liable to plaintiff for an alleged assault made upon him by an employé of defendant who was also a police officer and who went to the assistance of a policeman that requested aid in arresting plaintiff for disorderly conduct and drunkenness.[2]

4. SAME.
   When a police officer arrests a disorderly person it is presumed that he is acting in his official capacity and not as agent for his employer.

Error to Cass; Des Voignes, J. Submitted December 14, 1911. (Docket No. 130.) Decided March 12, 1912.

[1] As to when person who has started for a train becomes a passenger, see note in 24 L. R. A. 521.

[2] Liability of carrier for wrongful arrest of passenger by servant, see note in 7 L. R. A. (N. S.) 162.

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Case by Charles O. Buman against the Michigan Central Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed, and no new trial granted.

Gore & Harvey, for appellant.

Charles E. Sweet and *Wilbur N. Burns*, for appellee.

STEERE, J. This action was brought to recover damages for personal injuries alleged to have been inflicted upon plaintiff on the night of August 4, 1910, by John Bachman, an officer and night watchman in the employ of defendant at its station in the city of Niles, Mich.

Bachman was a duly elected constable of the city of Niles and police officer, but without pay from the city. As such officer he had authority to make arrests. He was 40 years of age, and had been in the employ of the defendant for several years. On the evening of August 4, 1910, plaintiff arrived in the city of Niles at about 11:30 on an interurban car from South Bend, Ind. He testifies that he was changing his location from Mishawaka, Ind., where he had been working, to Dowagiac, Mich., where employment was awaiting him, and it was his intention to take the east-bound Michigan Central train, scheduled to pass Niles soon after his arrival on the interurban. The time of the train's passing was 12:26 a. m. From where he left the interurban car to the Michigan Central station is about half a mile, and he proceeded to walk the distance, carrying two suit cases; one containing tools and the other his clothing. The route included a viaduct crossing over the Michigan Central tracks in the vicinity of its station. He stopped on the viaduct to rest, as he testified. William Metcalf, a police officer of the city of Niles, being on duty and in uniform, passed down the street to go over the viaduct to the station, making the rounds on his beat, timing himself to be there when the train arrived. Approaching the viaduct, he saw plaintiff standing on the bridge, and, turning his light upon him,

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discovered, as Metcalf testified, that plaintiff was committing a nuisance on the walk. Both parties testified that the officer called to the plaintiff and asked him what he was doing, and was told that it was none of his business. The officer testified that words were exchanged, and plaintiff soon picked up his grips and started for the station; that after being gone a short time he returned without his grips and proceeded to upbraid the officer for making him lose his cigar, using abusive language and threatening to throw him over the railing; that words followed, and, plaintiff persisting in his abuse and threats, the officer told him he would lock him up, and took hold of him; that plaintiff resisted and fought, and was proving too much for the officer, who was lame and a man 62 years of age, when two men from the station, whose attention was attracted by the loud words, came up and assisted. Plaintiff then jerked away and went towards the station; the officer and two men also going towards the station behind him.

Plaintiff's version of what occurred on the viaduct and at the station is as follows:

"I came to the depot side of the city viaduct and set my suit cases down for a rest. I was accosted from the back by some man that put a light on me and wanted to know where I was going.

"*Q.* Could you see the man?

"*A.* I could not.

"*Q.* What did you tell him?

"*A.* I told him I was on my way to Dowagiac.

"*Q.* What did he say then?

"*A.* I don't remember definitely; but I think he wanted to know what I was doing there. * * * I told him I didn't think that was any of his business, and he wanted—He says, 'If you are going to Dowagiac,' he said, 'you better be moving on.' I told him I didn't think I had to; but I hadn't said that much yet until he struck me, knocked me down.

"*Q.* Where did that blow hit you, do you remember?

"*A.* I don't just exactly remember whereabouts; but it was some place on the head. * * * As soon as I was knocked down, I got to my feet as soon as I could, picked

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my suit cases up, and started for the depot, when it came to me who that fellow might be. * * * I walked back on to the viaduct.

"*Q.* Left your suit cases down there?

"*A.* Yes, sir. * * * There I saw some fellow on top of the viaduct; but I didn't know it was the same man. I accosted him with a question, if I recollect rightly, as to what time that train left for Dowagiac, and the language that he answered me in I took it for granted it was the same man that had accosted me before, * * * from the way he answered me; we had words there. He undertook to strike me again, and I resisted and foiled his first attempt; but when he struck the second time he struck me, dazed me, staggered me. * * * From the way it felt, it was a club. * * * As soon as I got my balance again, got my feet, I noticed, I think, three other fellows coming up from the depot side; I started on for the depot. I walked down to my suit cases, and these fellows followed me up. I reached my suit cases and picked them up and started for the depot. As I reached the depot, there was some parties standing on the outside; I didn't know who they were. I went up to those parties and told them where I was going and when I wanted to go, and gave them some money."

It appears from other testimony that at the station he handed a piece of silver money to the baggageman and told him to get him a ticket for Dowagiac, and then turned on the policeman and men who were with him. He testified:

"I turned to say something to these fellows that had been following me, but don't recollect what it was, and don't know as I said it, and one of them knocked me down, and struck me such a blow on the head as to fall me, and as soon as I hit the walk one of those parties jumped on my head and sat there and told me something; but what he told me I don't know. Finally he got off my head, and I got to my feet, and I thought I was going to my suit cases again; but when I would rub my head and come to, I was out in the middle of the street."

All the other witnesses testified that plaintiff assaulted the policeman, using the vilest epithets towards him. The evidence is undisputed that the officer attempted to arrest

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him; that he resisted arrest most vigorously and for a time successfully. Metcalf, the officer, directed somebody to get Bachman, the watchman, who was inside fixing an electric light and knew nothing of all this trouble up to that time. Backman responded to the call, and at Metcalf's request proceeded to assist him in making the arrest, which was yet being actively resisted. In the struggle, plaintiff got inside of the station and clung to the railing for a time, from which he was detached with difficulty. He was finally overcome, hand-cuffed, and taken to the lockup, where he was delivered to the turnkey. That officer testified that he made no complaint of being injured, and went to sleep on the bunk in his cell, sleeping soundly.

The next morning he was taken by the city marshal before a magistrate, where he was charged, on complaint made by Policeman Metcalf, with resisting an officer, using obscene language, and drunkenness. The city marshal testified that when asked what his name was he said it was Charles Dooling, in which name the complaint was made against him, and that he pleaded guilty. Plaintiff testifies:

"He had three charges against me.

"*Q.* Do you know what they were?

"*A.* Being drunk, I think they were, and resisting an officer, and using indecent language.

"*Q.* What did you tell him about it?

"*A.* He wanted to know if I was guilty or not guilty. I told him I would not say; I could tell him better how it happened.

"*Q.* Did you tell him then what happened?

"*A.* I related to him as near as I could what had happened on the night before.

"*Q.* What did he say?

"*A.* He found me guilty and imposed a fine of one dollar and costs, and gave me 15 days to go on to Dowagiac and earn the money and make remittance to him."

It is denied by plaintiff that he was intoxicated on that evening. He testified that he had taken possibly three or

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four glasses of beer during the evening up until 11 o'clock, but that he was sober. A witness who was on the car from South Bend with him corroborates his claim. The officers and other witnesses testify that he was intoxicated. Two of the witnesses to the trouble which occurred at the station after Bachman was called testified that Bachman struck the plaintiff on the head with his club twice or more. Six witnesses to that transaction testified that he did not do so.

Whether plaintiff was intoxicated or not, whether more violence was used by the officers than was reasonably necessary to subdue plaintiff and effect his arrest, whether he was injured by them, and, if so, to what extent, are all facts in dispute, which, if defendant railway company was liable for the conduct of Bachman, would be issues of fact for a jury. But back of those issues we have the vital question of whether or not there are any facts in this case which might make defendant liable for Bachman's conduct.

In charging the jury, the court correctly stated this rule of law:

"An officer in the discharge of his duty may call others to his assistance, if deemed necessary by him to do so. So in this case, if you find that Officer Metcalf had placed the plaintiff under arrest, and sent for John Bachman afterwards to assist him in detaining the plaintiff and taking him to the lockup, then Bachman acted in his capacity as a peace officer of the State, and the defendant is entitled to your verdict of no cause of action."

It is the claim of the defense that there is no issue of fact upon that proposition, and it should have been disposed of by the court as a question of law. It is the claim of the plaintiff that the testimony is in conflict in that particular, and it was for the jury to determine. An examination of the record shows that all witnesses to the trouble which occurred outside the station, prior to the time Bachman was called, testify positively, or in substance, that the police officer, Metcalf, was then trying to arrest

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plaintiff, who was fighting with and resisting him. Plaintiff nowhere in his testimony denied this, though he claimed the officer first assaulted him.

Plaintiff's counsel rely on the testimony of the witness Whetstone as raising an issue of fact upon that question. Whetstone's testimony shows that he did not arrive on the scene until Bachman was called. According to the testimony of all the witnesses on both sides, who were then present at the time Metcalf sent for Bachman to aid him, plaintiff was resisting and fighting the officer. The witness Whetstone testifies:

"The man [plaintiff] just got up just as I got there. When I saw him, he was just getting up. I suppose he was lying down; I supposed he was. When he got up, there was a number of fellows right near him. Metcalf was one. I could not tell you whether Metcalf had hold of him; but I know he had hold of him when I turned round. When Bachman got hold of him, they both got hold of him. Mr. Bachman appeared there just as I appeared; I didn't know where he came from. * * * There was a good deal of talk going on there. * * * The officers took hold of this man, * * * one on one side and one on the other. * * * It appeared to me that these two men were trying to take him down town. I testify to that fact, because it so appeared to me at the time. * * * The plaintiff here was trying to go into the depot, using his strength to go that way. The plaintiff pulled them both into the station, * * * and the officers were trying to hold him, Mr. Metcalf and Mr. Bachman. * * * I think the officers were saying to him, 'Come on now.' * * * He was not coming on; he was going the other way. * * *"

This witness manifestly cannot testify to anything which occurred before he and Bachman arrived on the scene. All witnesses agree that plaintiff resisted and fought Metcalf, an officer in uniform and wearing his star. There could be no mistake at the station as to the official character of the man with whom plaintiff was having the trouble.

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Error is alleged on the refusal of the court to give defendant's request No. 4, which is as follows:

"I charge you that the plaintiff was not a passenger to whom the defendant, as carrier, owed any duty. To constitute the relation of carrier and passenger, the individual must present himself or herself to the carrier in a proper manner, at a proper place, and in a proper condition, and the relation of carrier and passenger will not attach until the carrier has accepted such individual as a passenger by selling them a ticket, or conducting them to a train, or permitting them to board a train, or do some act or acts which indicate an acceptance by the carrier of such individual as a passenger."

The relation of carrier and passenger did not exist between plaintiff and defendant. Undoubtedly plaintiff intended to become a passenger of defendant, and would have done so, were it not for the trouble he had with the policeman, Metcalf, on the viaduct and outside of the station. When he arrived outside the station, and without entering it, he set down his suit cases, handed 50 cents to the night baggageman, and turned upon the officer with whom he had previously had trouble. Plaintiff testifies:

"As I reached the depot, there was some parties standing on the outside; I didn't know who they were. I went up to these parties and told them where I was going and when I wanted to go, and gave them some money."

There is also testimony to the effect that while he was having trouble with the officer he called for a ticket, saying that he had given his money to the ticket agent, and rushed, with the officers holding onto him, into the station, grabbing hold of the brasswork in front of the ticket office. He was not sold a ticket nor accepted as a passenger.

At the conclusion of the testimony, defendant's counsel requested the court to direct a verdict, and presented, among others, the following request:

"It is uncontradicted that Officer Metcalf, having placed the plaintiff under arrest, sent for John Bachman, called 'Humpy,' to assist him in detaining the plaintiff and taking him to the lockup. This being so, I instruct

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you, as a matter of law, that John Bachman thereafter acted in his capacity as a peace officer of the State, and the defendant is not liable for his conduct as such officer. For such conduct, he is liable to the State alone. The undisputed evidence is that Bachman first rendered assistance to Police Officer Metcalf outside of the station building, and there assisted Officer Metcalf in detaining the plaintiff; that plaintiff resisted both of the officers and escaped from Officer Metcalf, and pulled Officer Bachman into the station with him; that in holding onto the plaintiff and doing what Officer Bachman did to subdue him and make him submit to authority, he did in his official capacity as a peace officer, and for such conduct the defendant railroad company is not liable."

This request was refused, and the case submitted to the jury. A verdict was rendered against the defendant for $5,000.

In his reasons for denying a motion for a new trial, the court said:

"Again, I am compelled to say that the claimed arrest was disputed by plaintiff, the witness Whetstone, and the testimony of the young boys, leaving the matter one of conflict. Certainly the court could not, under the circumstances, say that on this issue it was undisputed, and it became a question for the jury. Our Supreme Court have been quite particular in holding that if there is a scintilla of evidence upon the question it must be left for the jury. * * * The crux of the case, in my opinion, is, 'Was plaintiff under arrest by Officer Metcalf when Bachman was called?' Upon that issue, there was conflict in the testimony; it may be said to be slight, but for that the court would have directed a verdict, * * * and to that end the court clearly and positively instructed the jury that plaintiff could not recover if Buman was under arrest by Officer Metcalf at the time Bachman was called to assist, and if they so found, under the evidence, they need consider the case no further, but return a verdict for the defendant."

From a careful examination of the printed record, we are unable to discover that there was any evidence to go to the jury upon the question of Metcalf having placed plaintiff under arrest at the time Bachman was called.

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We have already discussed the testimony of witness Whetstone. Plaintiff, whose testimony is confusing and peculiar, does not deny being arrested at the time in question. Aside from the plaintiff and the policeman, who testified positively that he had made the arrest, there were four witnesses to what occurred outside the station before Whetstone and Bachman arrived—Stebbins, Fowler, Beckwith, and Curtiss. Stebbins, after testifying to the foul language used and assault made by plaintiff, says:

"Mr. Metcalf wanted to put him under arrest; he called for help, because the man was resisting him. * * * Mr. Metcalf says, 'I am trying to put this man under arrest.' * * * I could not say how many times Metcalf told him he was under arrest—all of a dozen."

Fowler testifies:

"Buman backed away from him [Metcalf] a little, and then started at him again. Mr. Metcalf says: 'Hold him there. Hold him.' * * * Mr. Metcalf says: 'Let him up. I want to arrest him.' We let him up, and he started for Metcalf again."

On cross-examination, witness, after repeating that Metcalf said, "Hold him," testifies, in the meantime, Metcalf tried to arrest him. Beckwith, the man who was sent after Bachman, tells of the assault and foul language used by plaintiff, of the others interfering to assist the officer and throwing plaintiff down, and testifies:

"* * * Then he [Metcalf] says: 'Let him up. I will take care of him.' And he got up * * * and came back at Metcalf as hard as he could for the start he had, and Metcalf says, 'Get Humpy.' So I went into the station. Mr. Metcalf, to my knowledge, stayed out with Stebbins, holding the man."

Witness Curtiss testifies, among other things:

"Mr. Metcalf says: 'Let him up. I want to arrest him.'"

It should not have been left to the jury to decide, as an

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issue of fact, whether Metcalf was arresting plaintiff at the time he sent for Bachman.

It is the undisputed testimony (except plaintiff's statement that he doesn't think so) that when plaintiff arrived outside the station he set down his grips, and, turning on the policeman, made use of most profane, vile, and obscene language. The court very properly charged the jury that the language it was claimed plaintiff used "was of such a type and of such character that an officer would be justified in making the arrest of any person using such language in a public place."

That the policman, Metcalf, as a public officer, while having trouble with and trying to arrest plaintiff, sent for Bachman to help him to do so, is clearly shown. Bachman only went in response to such call. He knew nothing of any trouble before. His action was initiated entirely by a call from the policeman to help him. It was not in obedience to the directions of an officer of the defendant or any call of duty, as its watchman, to protect the property or passengers of his employer. Had Bachman gone at the call of an official of the company, or on his own initiative in the line of his duties as watchman, a different question would arise.

It is urged by counsel for plaintiff that the question of whether Bachman was acting as a servant of the defendant in the line of his employment, or as a public officer, is a question for the jury, although the facts be undisputed; and in support of that contention many cases are cited; the principal ones upon which counsel rely being *Sharp* v. *Railroad Co.*, 184 N. Y. 100 (76 N. E. 923, 6 Am. & Eng. Ann. Cas. 250); *Deck* v. *Railroad Co.*, 100 Md. 168 (59 Atl. 650, 108 Am. St. Rep. 399); *Illinois Steel Co.* v. *Novak*, 184 Ill. 501 (56 N. E. 966); *Duggan* v. *Railroad Co.*, 159 Pa. 248 (28 Atl. 182, 186, 39 Am. St. Rep. 672); *Layne* v. *Railway Co.*, 66 W. Va. 607 (67 S. E. 1103); *Rand* v. *Railway Co.*, 40 Mont. 398 (107 Pac. 87).

These cases and many more are authority for the rule

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that on a certain class of undisputed facts, from which different men might reasonably draw different inferences, the jury shall determine in which capacity a given act was performed. But in all such cases the alleged offender, while exercising the functions of public officer and private employé, committed the violence complained of, not at the instigation of a third party, as in the case at bar, but by the direction of his employer or some one representing him, or on his own initiative in the belief that he was protecting his employer's interests and furthering his welfare.

The present cause is in marked distinction in that particular, and involves a different principle. The act of Bachman did not grow out of any authority conferred on him by defendant, because the plaintiff was not, to Bachman's knowledge at the time he was called, invading or offending against the railroad company's rights in any particular. The occurrences between Metcalf and plaintiff were as much an outside matter as if they had occurred away from the railroad company's grounds, in the fact that Bachman was called to leave the duties of his employer, in which he was at the time engaged, to respond as a peace officer to a call for help from an outsider. The master is not liable for the acts of his servant in assisting a third person. *Olive* v. *Whitney Marble Co.*, 103 N. Y. 292 (8 N. E. 552); *Murphey* v. *Caralli*, 3 Hurl. & Colt. 462; *Stone* v. *Hills*, 45 Conn. 44.

In *Foster* v. *Railway Co.*, 140 Mich. 689 (104 N. W. 880), it was said of men in private employ who also were appointed or elected police officers:

"When acting purely in their capacity as police officers, the defendant is not responsible for their acts. Only when the defendant, through its authorized agent, has employed or directed such police officers to act for it, does it become responsible. * * * If this police officer acted, in his alleged attack upon the plaintiff, solely in his capacity as an officer, and not by and under the direction of the conductor of the car, the defendant is not responsible for his act.

"When a disorderly person is arrested by a police offi-

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cer, the presumption is that the officer is acting in an official capacity, and not as an agent for the party who by law is required to pay him. *Jardine* v. *Cornell*, 50 N. J. Law, 485 (14 Atl. 590)."

And to like effect are *Tucker* v. *Railway Co.*, 69 N. J. Law, 19 (54 Atl. 557); *Healey* v. *Lathrop*, 171 Mass. 263 (50 N. E. 540); *Cordner* v. *Railroad*, 72 N. H. 413 (57 Atl. 234); *Tyson* v. *Bauland Co.*, 186 N. Y. 397 (79 N. E. 3, 9 L. R. A. [N. S.] 267).

This affray, in which it is alleged plaintiff sustained actionable injuries, was primarily Metcalf's, not defendant's. Metcalf, in the line of his official duty, effected the arrest of plaintiff, locked him up overnight, and made complaint against him the next morning for an offense of which he was convicted. At the time of the arrest, Metcalf was on duty, in the service of the city, as a peace officer patrolling his beat. Defendant was not concerned with, and cannot be held responsible for, any injuries inflicted on plaintiff by such city policeman or those summoned by him to his aid, even though one of them, being a peace officer, happened to be in defendant's employ as a watchman. The rule of *respondeat superior* does not apply where the servant is only responding to a call for assistance by a third party.

The judgment is reversed, and no new trial granted.

MOORE, C. J., and BROOKE, STONE, and OSTRANDER, JJ., concurred.

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SCHELOWSKI *v.* PAWLOWSKI.

1. CREDITOR'S SUIT — BILL IN AID OF EXECUTION — ISSUANCE AND LEVY AS PREREQUISITE.

   The levy of execution upon specific property is a prerequisite to the jurisdiction of equity upon a bill in aid of execution.

2. SAME.

   An averment of the bill that an alias writ of *fieri facias* was issued, delivered to the sheriff, and duly served by him, followed by a paragraph stating that the sheriff attempted to levy said execution upon real estate described, when he discovered that the property had been fraudulently transferred, etc., is insufficient to support the jurisdiction of the court of equity.

Appeal from Wayne; Murfin, J. Submitted January 9, 1912. (Docket No. 66.) Decided March 12, 1912.

Bill by Veronica Schelowski against Frank Pawlowski and others in aid of an execution. From a decree dismissing the bill, complainant appeals. Affirmed.

McIntyre & Wheeler, for complainant.

August Cyrowski, for defendants.

STEERE, J. Complainant filed a bill in aid of execution, in which she prays that a certain deed, dated October 21, 1909, executed by defendant Frank Pawlowski, conveying to the other defendants, who are his children, certain real estate in the city of Detroit, be set aside, a receiver be appointed, an injunction be granted, restraining defendants from transferring or encumbering the property, and that complainant be authorized, through the sheriff, to levy upon said property and sell the same to satisfy a judgment for $500 previously obtained by her against said Frank Pawlowski on the 5th day of July, 1910, for breach of promise of marriage.

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It appears, undisputed, that the defendant Frank Pawlowski, some time prior to Easter, 1909, made a valid contract of marriage with the complainant, under which everything proceeded harmoniously until about the middle of October, 1909, when he served a written notice upon her, implying a disinclination to carry out his part of said contract, and intimating she might consider the engagement broken. Prior to this, and as a step leading towards a consummation of said matrimonial contract, defendant agreed that on October 14, 1909, he would come over to complainant's place and go with her before the priest of the local church and have the engagement publicly announced; but for some reason not fully disclosed by the record, he experienced a change of heart, and, instead of observing that agreement, sent her the following emotional communication:

"DETROIT, October 14, 1909.

"I am sitting down to a table to write to your heart. Praise be the Lord Jesus Christ, and I suppose that you will answer me in eternity. Amen. Dear Woman: It is pretty hard for me to move to you. I have too much troubles because I am sick of all that—of all this trouble and mortification. It is hard, but I wish all luck and God's blessing and the Blessed Mother. Remain with God.

"FRANK PAWLOWSKI."

The record shows the following stipulation:

"It is further admitted that complainant did, on or about the 16th day of February, 1910, start suit in the circuit court for the county of Wayne for the alleged breach of the aforesaid contract of marriage; and, further, that complainant did prosecute her said action for breach of promise of marriage to trial in the said court on the 5th day of July, 1910, and after trial by jury of said cause of action a verdict was rendered in favor of said complainant in the sum of $500, and subsequently judgment was duly entered thereupon and costs taxed in the sum of $47.20; that said judgment remains in full force and effect, and had never been appealed from, and that an execution was rendered upon said judgment, as will more fully appear in the bill of complaint and amended bill of complaint thereto filed in said cause and made a part of this record.

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And it is further admitted that defendant has property whatsoever, other than this in question, out of which this judgment might be satisfied, and that no claim of homestead exemption is raised by said defendant, and that this bill is filed in aid of said execution."

The trial court dismissed complainant's bill, stating the following reason:

"The record shows that counsel for complainant admitted in two or three places that the property sought to be reached in this proceeding was transferred by this man to his children, eight of whom were minors, solely and entirely to obtain their consent to his proposed marriage to this complainant. The testimony of complainant herself indicates that, instead of this property being transferred after the breach of promise of marriage, it was transferred in contemplation of marriage, to the end that his children would have it, rather than his prospective wife."

The printed record in this court does not disclose the facts on which the foregoing conclusions are based. We find no admission of counsel, or testimony, to the effect that the transfer was made in contemplation of marriage, or to obtain the consent of the grantees to such marriage. On the contrary, the record shows that the engagement and estrangement preceded the conveyance.

It is urged that this bill should be dismissed, because no levy was made upon the property sought to be reached. The stipulation just quoted declares "that this bill is filed in aid of execution." If there was any question as to the nature of the bill of complaint under consideration, it is put at rest by this stipulation. It is not a judgment creditor's bill, filed to reach general equitable interests, or to discover sequestered assets of the debtor, but a bill in aid of execution, the function of which is to help in the enforcement of an acquired lien on designated property, a sale of which, on execution, is embarrassed by some fraudulent or inequitable obstruction. The rules which obtain in judgment creditors' bills and in bills in aid of execution are not the same. *Hodge* v. *Gray*, 110 Mich. 654 (68 N. W. 979).

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The evidence does not disclose that any levy has been made on the property described. Referring to the bill, which is made a part of the record, we find no allegation of that fact. Amended paragraph 3 of said bill states that an alias writ of *fieri facias* was issued, "and on the same day delivered to said sheriff, to be by him executed in due form of law;" and paragraph 4 of said bill states:

"That the said sheriff did make an attempt and was about to levy said execution upon the said above-described real estate, when he discovered that the same had been fraudulently transferred by the said defendant Frank Pawlowski, as will more fully hereafter appear."

From this it is evidenced that no levy has been made; the nearest the sheriff came to it he "was about to levy" upon the land sought to be held for the judgment, when his discovery of this conveyance diverted him from it.

No lien is acquired on real estate in Michigan under a judgment until actual levy of an execution. Before a bill in aid of execution can be entertained by a court of chancery to assist in enforcing an execution at law, not only must the execution be issued, but an actual levy made and lien acquired, on the property sought. To establish a *prima facie* case, proof of levy is required. Act No. 99, Pub. Acts 1897; *McKibben* v. *Barton*, 1 Mich. 213; *Blish* v. *Collins*, 68 Mich. 542 (36 N. W. 731); *Vanderpool* v. *Notley*, 71 Mich. 429 (39 N. W. 574).

"Not only must a person become a judgment creditor in order to be in a position to take proceedings to set aside fraudulent conveyances, but this must be followed by the issue of an execution and the levy of it upon the property said to have been so fraudulently conveyed." *Eames* v. *Manley*, 121 Mich. 300 (80 N. W. 15).

The decree of the trial court, dismissing the complainant's bill, is affirmed, with costs.

MOORE, C. J., and MCALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

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DETROIT & MACKINAC RAILWAY CO. *v.* SIOUX CITY SEED & NURSERY CO.

1. INJUNCTION — EMINENT DOMAIN — EQUITY — HIGHWAYS AND STREETS—VACATING BY MUNICIPAL CORPORATIONS.

   In a suit by a railroad corporation to restrain defendant from interfering with complainant's occupancy of a street legally vacated by the city, and the construction of a depot on the property, the court was warranted in finding, on a cross-bill by defendant, that the inconvenience suffered by defendant was insufficient to authorize the court in restraining a necessary improvement beneficial to the public.

2. SAME — DAMAGES — JURISDICTION OF CHANCERY — ADEQUATE REMEDY AT LAW—TAKING PRIVATE PROPERTY.

   If defendant suffered pecuniary damage by virtue of the closing of the street and rendering access to defendant's premises difficult or circuitous, it has a remedy at law for the damages which are readily ascertainable.

3. SAME—STATUTES.

   2 Comp. Laws, § 6284, par. 5, requiring railroad corporations before constructing their railways on streets, etc., to pay compensation to adjacent owners that are injured, does not have application to the erection of a station.

4. SAME—INJUNCTION.

   Defendant was not entitled to an order for an injunction to be issued in six months unless the railway company should institute proceedings to condemn defendant's rights, as such course would preserve to defendant no rights which it could not protect in an action against complainant.

Appeal from Alpena; Emerick, J. Submitted January 8, 1912. (Docket No. 10.) Decided March 12, 1912.

Bill by the Detroit & Mackinac Railway Company against the Sioux City Seed & Nursery Company for an injunction. Defendant filed a cross-bill praying for an injunction against complainant. From a decree for complainant, defendant appeals. Affirmed.

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Henry, Henry & Henry (*James McNamara*, of counsel), for complainant.

Joseph H. Cobb, for defendant.

In the year 1887, the complainant railway extended its road through the city of Alpena. Its main line ran along Tenth street through said city. By reason of the growth of the city, which now has between 13,000 and 14,000 inhabitants, it lately became necessary for complainant to build a new and more commodious passenger depot. To this end complainant acquired certain lands on Tenth street from Fair avenue on the west to Lockwood street on the east. These lands covered five blocks from east to west and were in width about one block from north to south. While most of the land so acquired is located on the south side of Tenth street, a considerable portion thereof abuts on the north side of said street. To facilitate the erection of said depot and properly handle the traffic incident to its new location, application was made to the common council of the city for the closing of certain streets and alleys running through the depot grounds, among which was Tenth street, from Fair avenue to Lockwood street. The proceedings to close said streets and alleys were regular and resulted in the passage by the council, by unanimous vote, of a resolution vacating Tenth street for a distance of five blocks, except at the intersection of cross-streets, also Saginaw street for the distance of one-half of the block south of Tenth street. This resolution was passed March 21, 1910.

Defendant is the owner of a grain and produce warehouse located upon the northeasterly corner of Saginaw and Tenth streets, but its property extends from Saginaw street to Tawas street, an entire block along Tenth street. Between March and September, 1910, negotiations were had between complainant and defendant, looking to an adjustment of the damages claimed by defendant, by reason of complainant's acts. These negotiations proved abortive, and on September 8th complainant filed its bill

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setting out the facts and averring that it was defendant's purpose to interfere with complainant in its contemplated use of said vacated streets and alleys. Complainant prayed that the defendant be enjoined from interfering with it in the prosecution of its project and its occupation of said vacated streets and alleys. Upon the filing of the bill, a temporary injunction was issued pursuant to the prayer therein contained. No motion to dissolve was made by defendant.

To the bill defendant filed an answer denying that it had any intention of interfering with complainant by the use of physical force, and by way of cross-bill averred that the acts of the city authorities in vacating said streets and alleys were illegal and void, as to said defendant's rights. It prayed that complainant be enjoined from taking possession of the vacated streets and alleys and from placing any buildings or obstructions thereon. The temporary injunction against defendant was continued until the cause was heard upon the merits. That hearing was had in April, 1911, and resulted in a decree dismissing both the bill and the cross-bill, but without prejudice to the maintenance by the defendant of a suit at law for the recovery of any and all damages sustained by it by reason of the operations of complainant. From this decree defendant appeals.

BROOKE, J. (*after stating the facts*). During the pendency of the cause, complainant proceeded with the erection of its new passenger depot, and the same has now been completed and stands squarely across Saginaw street where said street was closed by the action of the city authorities. Complainant has expended in the purchase of land and in the erection of this building upwards of $75,000. The learned circuit judge who heard the case held:

"That the closing of Tenth and Saginaw streets and the alley in block 7 will work no such serious loss or injury to defendant as to justify the interference of a court of equity

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to restrain the completion of a great and much needed public improvement."

With this conclusion we quite agree. It is apparent that defendant now has ingress and egress to its property by means of two streets—on the west, Saginaw street north of Tenth street, and on the east, Tawas street. It is urged by defendant that access to its property by way of Saginaw street is impossible by reason of the occupancy of a portion of that street by the Michigan Veneer Company. That occupancy, however, is not shown to be by virtue of any action of the city authorities in closing said street, and it would seem (in the absence of such action) that defendant would have a right to the use thereof as a public street. The most that can be said of the case made by defendant is that its customers approaching it from certain directions will be obliged to adopt a somewhat circuitous route, instead of going from Ninth street directly up Saginaw street to defendant's premises, as heretofore they have been able to do.

If defendant has suffered damage by reason of the acts of the complainant in the premises, that damage is readily ascertainable and is recoverable in a suit at law. *Buhl* v. *Union Depot Co.*, 98 Mich. 596 (57 N. W. 829, 23 L. R. A. 392), and cases there cited; *Baudistel* v. *Railroad Co.*, 113 Mich. 687 (71 N. W. 1114); *Beutel* v. *Sugar Co.*, 132 Mich. 587 (94 N. W. 202).

It is urged by appellant that before proceeding with the erection of its depot which occupies a portion of Saginaw street, south of Tenth street, it was the duty of the complainant to proceed to condemn defendant's interest therein and to pay such damages and compensation to defendant as might be awarded. It is contended that this duty is imposed by 2 Comp. Laws, § 6234, par. 5, which reads as follows:

"And in case of the construction of such railway upon any public street, lane, alley, or highway, the same shall be on such terms and conditions as shall be agreed upon between the railroad company and the common council of

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any city, or the village board of any village, or the commissioners of highway of any township in which the same may be; but such railway shall not be constructed upon any public street, lane, alley, highway or private way until damages and compensation be made by the railroad company therefor to the owner or owners of property adjoining such street, lane, alley, highway, or private way, and opposite where such railroad is to be constructed either by agreement between the railroad company and each owner or owners, or ascertain as herein prescribed for obtaining property or franchises for the purpose of its incorporation to be paid to the owner thereof, or deposited as hereinafter directed."

We think it is clear that the paragraph quoted and relied upon relates solely to the construction of the railway, and has no bearing upon the right of the railroad company to occupy a portion of a legally vacated street with its depot. *Highway Com'r of Ecorse Township* v. *Railroad*, 148 Mich. 436 (111 N. W. 1090). Our attention is not directed to any statute under which the complainant could have proceeded in the manner suggested.

The cross-bill prays for injunctive relief only. Upon the argument it was suggested by counsel for appellant that this court should not presently enjoin complainant from using the depot it has constructed, in part upon the vacated street, but that it should make an order that such injunction issue unless within six months complainant should institute proceedings against defendant to condemn. This course, if authorized and followed, would preserve no right to defendant not already possessed by it under the present decree. It would simply be defendant in a proceeding instead of plaintiff. Its measure of damages would be the same in either case.

The decree is affirmed, with costs.

MOORE, C. J., and STEERE, MCALVAY, BLAIR, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

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CARSON, PIRIE, SCOTT & CO. *v.* JOZWIAK.

SALES—CONTRACTS—CONSTRUCTION—GUARANTY.

Defendant sold his dry goods business, taking a chattel mortgage from the purchaser to secure part of the purchase price. It was stipulated in the mortgage that if defendant should become guarantor for any goods ordered by the purchaser of the stock of merchandise the amount guaranteed should be added to and secured by the chattel mortgage. Plaintiff secured an order from the purchaser and wrote to defendant to guarantee the account. Defendant replied to send the goods and bill in his name. Plaintiff shipped the goods to the purchaser who gave the order, and charged defendant with the shipment. *Held*, that in the light of the surrounding circumstances, defendant was liable as the principal and that plaintiff was not required to ship the goods directly to him.

Error to Bay; Collins, J. Submitted January 4, 1912. (Docket No. 68.) Decided March 12, 1912.

Assumpsit by Samuel C. Pirie and others, doing business as Carson, Pirie, Scott & Company, a copartnership, against John F. Jozwiak for goods sold and delivered. Judgment for plaintiffs. Defendant brings error. Affirmed.

John E. Kinnane, for appellant.

Lee E. Joslyn, for appellee.

BLAIR, J. For a number of years prior to March, 1908, the defendant, John F. Jozwiak, was engaged in the retail dry goods business in Bay City, and had been dealing with plaintiffs to a considerable extent during the time that he was so engaged. In March, 1908, Jozwiak sold out his store and business to Frank M. Rosengard, receiving part of the purchase price in cash, and taking a

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chattel mortgage for the balance which remained unpaid. The chattel mortgage contained a clause to the effect that it was contemplated that Jozwiak might become guarantor for the purchase of goods by Rosengard, and that in such case the amount or amounts so guaranteed would be added to the amount secured by said chattel mortgage, in case Jozwiak was subjected to liability upon such guaranty. Rosengard had been running the store and business for about a year and a half after said purchase before the transaction involved in this case occurred.

In September, 1909, A. E. Jameson, plaintiffs' traveling salesman, called at the Rosengard store, and listed, in the form of an order, a quantity of goods which Rosengard needed, and then sought to have Mr. Jozwiak guarantee payment for the goods so listed in said order. Mr. Jameson sent in the order to his house, and then he wrote to his house as follows:

"J. F. Jozwiak, Bay City, Mich., former owner of F. M. Rosengard store, has been guaranteeing the acc't with other firms. I saw Jozwiak (who used to be a good customer of ours) about this bill and he told me he may have to take back the stock. Will know in a couple of days. He also knows they have got to buy to assort up. You write Mr. Jozwiak before filling the order."

Upon receipt of this letter plaintiffs wrote the defendant as follows:

"CHICAGO, Sept. 16, 1909.

"Mr. J. F. JOZWIAK,
"Bay City, Mich.

"*Dear Sir:*

"Our Mr. Jameson has taken an order to be shipped to F. M. Rosengard, and requests that we write you for a guaranty to cover this order before we make shipment.

"We are therefore enclosing one of our blanks and will appreciate it if you will sign and return at your early convenience."

Upon receipt of that letter and the blank form for a general guaranty inclosed, Mr. Jozwiak wrote the plaintiffs as follows:

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"BAY CITY, MICH., Sept. 16, 1909.
"CARSON, PIRIE, SCOTT & CO.,
"Chicago, Ill.
"*Gents:*
"Please send at once, Mr. F. M. Rosengard's order, this time, the goods and bill on my name.
"Respectfully,
"J. F. JOZWIAK."

Mr. Jozwiak testified that there was an error in dating the above letter written by him to plaintiffs, and that the date should be September 17th or 18th, instead of September 16th, and that it was in fact written after he received the above letter from the plaintiffs, inclosing their blank for guaranty. About 10 days after the receipt of the said letter from Jozwiak, plaintiffs shipped the goods specified in the Rosengard order to Frank M. Rosengard, at Bay City, and mailed an invoice thereof to defendant.

Mr. Jozwiak testified that after taking the order Jameson saw him and told him that it would not amount to $300. The court held and charged as a matter of law, that the defendant was liable to the plaintiffs, and that the amount of said liability was not less than $300; and the only question that the court submitted to the jury was whether defendant's liability was limited to $300 or the full amount of the order, agreed upon as $551.90. The jury rendered a verdict in favor of the plaintiffs for $551.90.

The principal question in the case concerns the interpretation of defendant's letter, dated September 16, 1909. Defendant contends that the letter should be construed to mean that the goods ordered by Rosengard should be shipped directly to defendant, Jozwiak. Plaintiffs insist that the letter contemplated that the goods should be shipped to Rosengard on defendant's credit. Considering this letter in the light of the surrounding circumstances, we think it should be construed to require shipment of the goods to Rosengard, and that the same should be charged to de-

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fendant. In view of this holding, the other questions raised by defendant become immaterial.

The judgment is affirmed.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, STONE, and OSTRANDER, JJ., concurred. BIRD, J., did not sit.

NISSLY *v.* DETROIT, JACKSON & CHICAGO RAILWAY CO.

1. STREET RAILROADS — NEGLIGENCE — OPERATION OF CARS — ANIMALS.

That a motorman of an interurban railroad failed to ring his gong, and instead, tried to stop the car in order to avoid killing a colt on the track, was not negligence merely because the event proves the way he selected was not the best to meet the exigency.[1]

2. SAME.

And it was error to charge the jury that it was his duty to use all means at his command to avoid the accident, that if he failed to employ all reasonable means within his power to avoid the accident, or if he was careless, reckless, or indifferent, he would be guilty of negligence, and that under ordinary circumstances it would have been his duty to ring his gong, and failure to do so would be evidence of negligence.

3. SAME — RATE OF SPEED — EXCESSIVE SPEED.

Whether a rate of speed of forty miles an hour was reasonable, along a public highway, was for the jury.

4. SAME — ANIMALS IN HIGHWAY.

While the motorman owed no duty to reduce his speed below a rate that would otherwise be reasonable, not being bound to anticipate that plaintiff's horse was at large, if he was run-

[1] As to injuries by street car collisions with vehicles or horses, see note in 25 L. R. A. 506.

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ning the car so rapidly that he could not have stopped it within such distance as the colt could have been seen upon a straight track, the question of negligence was for the jury.

5. SAME—CONTRIBUTORY NEGLIGENCE.

The owner of a colt who permits it to run at large in a highway over which an electric road is operated, or who carelessly permits it to escape, is guilty of contributory negligence.

ON REHEARING.

APPEAL AND ERROR—SAVING QUESTIONS FOR REVIEW—ASSIGNMENTS OF ERROR—CHARGE.

Plaintiff's motion for a rehearing having been granted and the case reargued, his judgment is affirmed on the ground that the error in the court's charge on which the judgment was reversed by the original opinion in this cause was waived by appellant's failure to assign error upon the objectionable portion of the charge or to refer to the point in its brief. Supreme Court Rule 40.

Error to Washtenaw; Kinne, J. Submitted April 10, 1911. (Docket No. 68.) Decided May 8, 1911. Rehearing granted September 29, 1911. Previous opinion reversed March 29, 1912.

Case by Charles Nissly against the Detroit, Jackson & Chicago Railway Company for the negligent killing of plaintiff's colt. Judgment for plaintiff. Defendant brings error. Affirmed.

M. J. Cavanaugh and *George J. Burke*, for appellant.

J. W. Bennett, for appellee.

HOOKER, J. Plaintiff recovered a judgment for $100 for the loss of his colt, killed by defendant's electric car. Defendant has appealed.

The car was being run from Ypsilanti to Saline, along and within the limits of the public highway, at a rate of from 30 to 40 miles an hour. The head lamp was lighted. The plaintiff's residence was upon an eminence of eight feet, from which the road descended in each direction.

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From 200 to 250 feet west of plaintiff's house, there was an oak tree, which stood between the track and the fence. The plaintiff's testimony indicates that he left the colt tied in his barn, with the doors shut, and on his return from Saline found the horse dead. The motorman and conductor of the car, being the only witnesses who saw the accident, testified that the car was running at a speed of from 30 to 40 miles an hour. Both were in the front of the car, and as the car got up the hill and in front of plaintiff's house both saw this colt come from behind the oak tree mentioned and run upon the track directly toward the car, until he collided with it. They testified that the motorman did all possible to stop the car, and that he did not ring the gong. The motorman said that he had no time to ring it; his attention being wholly directed to stopping the car. There was no evidence indicating that the horse got caught or entangled in the rails that lay beside the track.

The negligence charged is that the duty of the motorman was to so run his car as to speed that it would be at all times under his complete control, and so that it might be stopped within a short distance, should any cattle or horses or other property of the plaintiff be seen and observed on the track, and so that the car would be stopped, before it should strike or injure the horse or cattle of plaintiff. Yet, although the horse was visible in time to have checked and stopped the car without injury to said horse, he failed and neglected to do so, and the horse was killed. It was also claimed that rails were strewn along the track and prevented the horse, who became caught and ensnared by them, from getting off the tracks in time to avoid the car; but there was no testimony calling for the submission of this question, and no question is raised upon it in defendant's brief.

Upon the undisputed proof, the horse was struck at or near 11 o'clock at night, about 50 feet from where he was first seen, and the motorman was not negligent in his efforts to stop the car, unless it was negligence to omit to

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ring the gong. Whether this was negligence upon this record, and whether there was negligence in the rate of speed, were the important questions at the trial.

Upon this record we have three questions: (1) Was defendant proved guilty of negligence? (2) Was plaintiff negligent? (3) Was the verdict contrary to the evidence?

Defendant's Negligence. The undisputed evidence shows that the colt emerged from behind a tree, and that up to that time he was not visible. The two railroad men testify to this, and the plaintiff said that the colt might not be visible, if behind the tree. The undisputed testimony shows, also, that when he came on the track he was plainly visible by aid of the headlight; that he ran directly toward the car, until he collided with it; and that during this time the motorman did his best to stop the car. It is said that he was negligent in not ringing the gong. His evidence indicates that he was engrossed in his efforts to stop the car, which, in his judgment, was more important than ringing the gong.

Counsel urge that ringing the gong might have frightened the animal from the track, and it is possible that this is true. This was a question which should have been submitted to the jury, had there been any dispute in the testimony, with the instruction that:

"When, to avoid an impending collision, the motorman is obliged to choose instantly one of two appliances (or methods) provided for stopping the car (or averting the collision), he is not guilty of, and his company is not chargeable with, negligence, because the event proves that the one he chose and used may not have been efficacious, or the best to meet the exigency."

See *Bittner* v. *Railway Co.*, 153 N. Y. 76 (46 N. E. 1044, 60 Am. St. Rep. 588); *Wynn* v. *Railroad Co.*, 133 N. Y. 575 (30 N. E. 721).

In the case of *Stabenau* v. *Railroad Co.*, 155 N. Y. 515 (50 N. E. 277, 63 Am. St. Rep. 698), the court said, where the motorman had used the brake, instead of reversing the current:

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"Whether the one or the other means provided for stopping the car should have been adopted was a matter for the exercise of the motorman's judgment, and, though newly employed, he was not shown to be incompetent. For an error in its exercise, the defendant could not be held responsible. Even the failure to have exercised the best judgment would not have been evidence of negligence."

As the record stands, therefore, the court should not have instructed the jury that:

"It was the duty of the motorman, as soon as he saw this colt on the track, to use all means at his command to avoid this accident. If he did so and his car was under such control as I have before described to you, then he was guilty of no negligence. If, on the other hand, he failed to employ all reasonable means within his power to avoid this accident, or if he was careless or reckless or indifferent, then he would be guilty of negligence. Under ordinary circumstances, it would have been his duty to have rung his gong, and thus give notice of his approach, and a failure so to do would be evidence of negligence; but if, under the peculiar circumstances of this case, his failure so to do can be explained and excused on the ground that he did all that a prudent person could naturally be expected to do under like circumstances, then no negligence in this respect can be charged against the motorman."

The Rate of Speed. There was testimony that the car was running at 40 miles an hour when the colt was first seen, and plaintiff's counsel claim that this was an unreasonable rate of speed, which prevented the stopping of the car in time to avoid the collision.

If the rate of speed was a reasonable one, there was no negligence, and the question of reasonableness was one to be determined on all the facts and circumstances.

This motorman was not bound to anticipate that plaintiff's horse would be at large, or concealed behind a tree, and therefore owed no duty to reduce his speed below what would otherwise be reasonable. It is undeniable, however, that if his rate of speed was unreasonably great it would be negligent, and we are of the opinion that if

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the motorman was running his car so fast that he could not have stopped it within the distance that this colt could have been seen upon a straight track, the jury might have been justified in finding the speed unreasonable. But if the colt came onto the track, well within the distance that he could have been seen, the fact that the car could not be stopped before it struck him would not make the rate unreasonable.

We cannot lose sight of the public convenience, and its desire for rapid transit, with the inducement to run these cars at a much higher speed than 30 miles an hour. They are in competition with steam roads, which run faster than that. Where they run in the highways, which are also used by other vehicles, the circumstances of such use are to be considered. The legislature has power to control and regulate speed, and may require adequate protection. Until this power is exercised, we can recognize only the rule that the rate is unlimited, except by the general rule that it must be reasonable under all the circumstances. *Gosnell* v. *Railway Co.*, 21 Ont. App. 553; Nellis on Street Railways, § 393 *et seq.*; *Stafford* v. *Railroad Co.*, 110 Wis. 331 (36 N. W. 1036).

This motorman was not bound to anticipate that a colt would be at large, and come suddenly upon the track so near that the car could not be stopped in time to avert an accident, and, if his speed was not such as to have precluded the stopping of the car within the distance that such an object could have been seen upon the track that night, there was no negligence. This was, however, a question for the jury. Apparently this was the view taken by the circuit judge. *Gilmore* v. *Railway Co.*, 153 Pa. 31 (25 Atl. 651, 34 Am. St. Rep. 682); Nellis on Street Railways, § 515.

Was plaintiff negligent? The plaintiff had no right to allow his colt to run at large in the highway. If he did so intentionally on that occasion, or if it escaped by reason of his negligence, he should not have had a verdict.

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Whether either of these conditions existed was a question for the jury, as the trial judge held.

As we are constrained to reverse the judgment for the reason first stated, it is unnecessary to refer to the refusal of a new trial.

The judgment is reversed, and a new trial ordered

OSTRANDER, C. J., and BIRD, BLAIR, and STONE, JJ., concurred.

ON REHEARING.

BIRD, J. After this case had been decided (*ante*, 676 [131 N. W. 145]), the plaintiff applied for and was granted a rehearing. Upon the rehearing it was urged that the case should not have been reversed for the reason stated in the opinion, because the point was neither raised by defendant's assignments of error, nor discussed in counsel's brief.

The ground upon which the reversal is based in the opinion is that part of the charge of the trial court in which he stated to the jury what the duty of the motorman was with reference to sounding the gong. We have examined the records and briefs carefully, and are of the opinion that plaintiff's point is well taken. No assignment of error is predicated upon that part of the charge, unless it be defendant's general exception to the whole charge. Such an assignment is too general to reach specific objections of this character. *Snyder* v. *Patton & Gibson Co.*, 143 Mich. 350 (106 N. W. 1106).

Even if the general assignment were sufficient, we would be obliged to hold that it was waived by reason of failure of counsel to refer to it in their brief. Supreme Court Rule 40; *People* v. *Cole*, 139 Mich. 312 (102 N. W. 856).

With this assignment eliminated, it would follow that the case should be, and is hereby, affirmed.

MOORE, C. J., and STEERE, MCALVAY, BROOKE, BLAIR, STONE, and OSTRANDER, JJ., concurred.

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ROHDE v. WAYNE CIRCUIT JUDGE.

INTOXICATING LIQUORS — WARNER-CRAMTON ACT — LICENSE — NUMBER OF SALOONS—INJUNCTION.

In a village of 880 inhabitants having more than one saloon to 500 inhabitants, as limited by the Warner-Cramton law (Act No. 291, Pub. Acts 1909), three saloon keepers being engaged in business at the time said law took effect and holding over, a new applicant should have been denied a license and was properly restrained from engaging in business by a preliminary injunction.

ON REHEARING.

1. SAME—PREFERENCE—MUNICIPAL CORPORATIONS.

Where relator's application was first considered and granted by the village council, being filed before April 15th, the action of such council was a proper exercise of preference; as it was not intended by the statute to prefer those already engaged in business. Former opinion reversed. MOORE, C. J., and BLAIR, J., dissenting.

2. SAME—STATUTORY CONSTRUCTION.

If possible, the court should give effect to every word, clause, and sentence of a statute, and should reconcile the different provisions so as to render the act consistent.

3. SAME—MANDAMUS.

The fact that the council unlawfully granted licenses to four applicants, including relator and the three other liquor dealers, should not deprive relator of his remedy.

4. SAME—LOCATION—STATUTES.

That relator intended to conduct a saloon in a residence district without having obtained the consent of all property owners within 300 feet, under section 37 of the act, is not a sufficient ground of objection, where the proposed location had been previously occupied for the same purpose.

Mandamus by Fritz Rohde to compel James O. Murfin, one of the circuit judges of Wayne county, to vacate an order temporarily restraining relator from engaging in the sale of intoxicating liquors in the village of Grosse

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Pointe, in said county. Submitted May 9, 1911. (Calendar No. 24,612.) Writ denied June 2, 1911. Rehearing granted September 29, 1911. Writ of mandamus granted March 29, 1912.

George F. & Peter J. Monaghan (*Alex J. Groesbeck*, of counsel), for relator.

Miller, Smith, Paddock & Perry, for respondent.

MOORE, J. The petition filed in the above case prays for a writ of mandamus to compel the respondent, James O. Murfin, circuit judge, to set aside an order granting and continuing a temporary injunction in a case pending before him, wherein Philip T. Van Zile is complainant and Fritz Rohde and William F. Moeller, county treasurer of Wayne county, are defendants.

The facts which occasioned the issuance of this temporary injunction, as found by the judge, are as follows: That the village of Grosse Pointe has at the present time a population of 830 inhabitants; that on the 2d day of September, 1909, when the so-called Warner-Cramton law went into effect, there were five or six saloons doing business within the corporate limits of the village; that Van Damme, Krumholz, and Doerr were then doing business; that in April of the year 1910 the relator in this case and William R. Dobson both applied for licenses to engage in business at the same site; that both licenses were granted, and Dobson occupied the premises for about a month, and thereafter ceased doing business, whereupon the relator, who had theretofore been granted a license, engaged in business at the same place, and has since continued operating therein; that on the tenth of April of this year Rohde, Van Damme, Krumholz, and Doerr all applied for licenses, and all obtained from the village council licenses to do business in this community. The court further found that the record discloses "that there can be no question but that Mr. Rohde's license was the first one taken up by the village trustees;" that, when

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they were considering his bond, a protest was made against the granting of the license.

These findings were fully justified by the evidence. The four licenses mentioned above were all granted at the same meeting. The provisions of law to be construed in this proceeding are found in section 39, Act No. 291, Pub. Acts 1909. It is clear that by the terms of this act "the number of licenses issued shall in no case exceed one to every five hundred inhabitants according to the last United States census, except as provided in said section." We quote therefrom:

"When applied for in accordance with the provisions of this act, bonds shall be approved by the local board, board of trustees, council or common council in each township, village and city for retail liquor dealers, not to exceed the number doing business in said township, village or city in the month of April, nineteen hundred nine: *Provided*, that if after this act takes effect the number of retail liquor dealers in any township, village or city shall be in excess of the ratio of one to each five hundred inhabitants, according to the last United States census, no license or licenses shall be issued to any person or persons to take the place of such license or licenses as shall have been revoked as in this act provided, or that shall voluntarily have been surrendered, until the ratio of the licenses granted, and the saloons in such township, village or city shall not exceed one saloon, for every five hundred inhabitants thereof, according to the last United States census: *Provided further*, that said township board, board of trustees, council or common council, of any township, village or city may by ordinance limit the number of licenses to be granted for such township, village or city; but the number of licenses issued shall in no case exceed one to every five hundred inhabitants according to the last United States census, except as herein provided: *Provided further*, if the applications for such license filed on or before April fifteenth of any year equal or exceed the maximum number permissible under this section, no further application shall be considered."

When this law took effect, the relator was not engaged in the saloon business in the village of Grosse Pointe, and

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Van Damme, Krumholz, and Doerr were, and, at the time this proceeding was commenced, were still doing business there, making three saloons in a village of 830 inhabitants. The village council should not have considered Mr. Rohde's application, either in April, 1910, or in April, 1911.

Counsel for relator call attention to *Hanold* v. *Common Council of Stambaugh*, 163 Mich. 242 (128 N. W. 233), and claim it is controlling in his favor. We think a reference to this case will show it is not in point.

The application of the relator is denied, with costs. See *Stenglein* v. *Saginaw Circuit Judge*, 128 Mich. 440 (87 N. W. 449).

MCALVAY, BROOKE, BLAIR, and STONE, JJ., concurred.

ON REHEARING.

STONE, J. A rehearing has been had in this case. The petition of relator prays for a writ of mandamus to compel the respondent to set aside an order granting and continuing a preliminary injunction in a case pending before him, wherein Philip T. Van Zile is complainant and this relator and William F. Moeller, county treasurer of Wayne county, are defendants. See original opinion, *ante*, 683 (131 N. W. 523).

The original opinion may be referred to for a statement of facts. They are not much in dispute. The relator had, prior to April 10, 1911, filed with the village clerk of the village of Grosse Pointe a written application for license to engage in the retail liquor business. There is no question that this application conformed in all respects to the requirements of Act 291 of the Public Acts of 1909. He was not disqualified from engaging in such business. His application was considered at the regular meeting of the village board on the evening of said day. The record shows that his application was the first considered and approved, and that before action was taken upon other applications. His bond, which appears to have been in

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conformity with the provisions of said act, was likewise first considered and approved, and that before action was taken on the remaining bonds. This action was in no way modified or changed by any subsequent action of the board. It is conceded in the said bill of complaint that said village was entitled to not more than three saloons, and that four applications were presented.

In the opinion of the respondent continuing the injunction in force, and after giving his views as to the intention of the legislature, he said:

"This being true, it seems to me that any effort in the case at bar to give a license to do business to Mr. Rohde, who was not doing business at the time this act went into effect, is contravening the express provisions of this act, especially in view of the fact that the other men now licensed to do business by this village council, were doing business at the time the Warner-Cramton law went into effect."

The application of the relator having been first unanimously approved by the board, I am of the opinion that the respondent erred in his construction of the act, and that we reached a wrong conclusion in our former opinion in this case. Under the circumstances here disclosed, any person not disqualified may apply for a license, and a "new man" stands upon an equal footing with those engaged in the business when the act took effect.

In my opinion, the general object of the Warner-Cramton act, so-called, was two-fold; *i. e.*:

(1) To gradually reduce the number of saloons in a municipality, until the number should not exceed the ratio of 1 to each 500 inhabitants, according to the last United States census.

(2) To improve the personnel of those engaged in the traffic, and the character of the business.

In support of the first proposition, we may quote the language of the first part of section 39, which reads as follows:

"When applied for in accordance with the provisions of this act, bonds shall be approved by the local board,

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board of trustees, council or common council in each township, village or city for retail liquor dealers, not to exceed the number doing business in said township, village or city in the month of April, nineteen hundred and nine: *Provided*, that if after this act takes effect the number of retail liquor dealers in any township, village or city shall be in excess of the ratio of one to each five hundred inhabitants, according to the last United States census, no license or licenses shall be issued to any person or persons to take the place of such license or licenses as shall have been revoked as in this act provided, or that shall voluntarily have been surrendered, until the ratio of the licenses granted, and the saloons in such township, village or city shall not exceed one saloon for every five hundred inhabitants thereof, according to the last United States census: *Provided further*, that said township board, board of trustees, council or common council of any township, village or city may by ordinance limit the number of licenses to be granted for such township, village or city; but the number of licenses issued shall in no case exceed one to every five hundred inhabitants according to the last United States census, except as herein provided."

The last clause of said section is pertinent and significant in this connection. It reads as follows:

"It is understood that in the counties that have adopted local-option, or may hereafter adopt the same, and afterwards vote to return to the license system, there may be established saloons *not to exceed* one to every five hundred inhabitants of any township, village or city in said counties."

In support of the second proposition, it is only necessary to refer to the general provisions of the act that a license can be granted only to citizens of the State of Michigan and of the United States. It cannot be granted to a woman, nor to any person who has served time in any State prison or penitentiary of this or any other State, nor to any person who, since the act took effect, has been twice convicted of any violation of the liquor laws of this State, or of any other State. (Section 4.)

I am also of the opinion that the general purpose of this

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act to improve the personnel of the business is evidenced by the following provision of section 39 of the act:

"*Provided further*, if the applications for such license filed on or before April fifteenth of any year equal or exceed the maximum number permissible under this section, no further application should be considered; and if such applications exceed such maximum number the township board or village or city council shall grant the maximum number, *and shall determine which of the applications so filed shall be granted.*"

This provision plainly gives the license-giving authority the power to exercise its discretion and judgment as to which of the applicants, in such a case, are most likely to carry on the business in compliance with the law. If the number of eligible applicants exceeds the number of licenses which can be granted, preference should first be given to those whose applications were filed on or before April 15th, and "after that to applications in the order in which the same are filed." In other words, where the number of eligible applications for licenses exceeds the number of licenses to be issued, the license-issuing authority has a right, subject to the above limitations, to determine to whom licenses shall be granted. In making this determination, the act does not provide that preference shall be given to those already engaged in the business. To give any such preference would be to give to those already in business a vested right therein, beyond the life of their licenses, and this cannot reasonably be claimed. This legislation was a reasonable regulation of the business, which the legislature had the power to enact. *Reithmiller* v. *People*, 44 Mich. 280–285 (6 N. W. 667); *Fuchs* v. *Grass Lake Common Council*, 166 Mich. 569 (132 N. W. 96).

The language that the license-issuing body, in the instance stated, "shall determine which of the applications so filed shall be granted" is plain and unambiguous. These words should be given their common and ordinary meaning. It is a cardinal rule in the construction of

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statutes that effect is to be given, if possible, to every word, clause, and sentence. It is the duty of the court, so far as practicable, to reconcile the different provisions, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each. 36 Cyc. pp. 1128, 1129. This construction of the statute is, I think, a reasonable one; and nothing will tend more effectually to improve the conduct and manner of business of the saloon keeper than to have it understood and distinctly held that in cases like the instance named, *i. e.*, where the applications filed on or before April 15th of any year exceed the maximum number of saloons permissible, the license-issuing body may exercise its discretion and judgment, and determine which of the applicants shall be licensed, without reference to the fact of whether they are, or are not, already engaged in the business.

It is said that if this court grants the writ of mandamus as prayed for, the effect will be to give the village of Grosse Pointe four saloons; while the law says only three should be allowed. The same objection was made in *Hanold* v. *Common Council of Stambaugh*, 163 Mich. 242 (128 N. W. 233); but it was held that that fact should not deprive the relator of the relief prayed for, as he was not responsible for the unlawful action of the council.

It is also urged that the right of relator to conduct a saloon at the corner of Jefferson avenue and Fisher road (it being in a residence district) is involved here; and that "consent of all the property owners within three hundred feet of the proposed bar or saloon" should be obtained, under the provisions of section 37 of the act. But it should be borne in mind that by the terms of the proviso at the close of said section it is provided that "none of the provisions of this section shall apply to any bar or saloon established and existing at the time this act takes effect." The bill of complaint in the cause, wherein the injunction complained of was issued, expressly stated that William R. Dobson, for several years prior to May 1, 1910, had been conducting a saloon at the corner of

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Jefferson avenue and Fisher road in said village. It would therefore appear that said section 37 has no application here.

The writ of mandamus should issue as prayed for, but without costs.

STEERE, MCALVAY, BROOKE, OSTRANDER, and BIRD, JJ., concurred with STONE, J.

MOORE, C. J. (*dissenting*). An opinion was handed down in this case June 2, 1911. It is found *ante*, 683 (131 N. W. 523). A rehearing has been had. A reference to the opinion which was filed will be helpful now.

I do not think upon any theory of the case a different result should be reached from the one heretofore announced. What was done by the village council about relator's application was not shown upon the trial in the court below by the records of the village, but was shown by the oral testimony of two of the village trustees. The trial judge found, in addition to what is stated in the former opinion, the following:

"So far as the record before me now discloses, there can be no question but that the record clearly indicates that Mr. Rohde's license was the first one taken up by the village trustees, and that before they had completed their action upon, and while they are considering his bond, before it had been approved, a protest was lodged with them against granting the license to this man."

The record also discloses that at this same session the applications for licenses of three other saloon keepers were considered and approved. It further shows that their bonds were approved; that they paid their license fees, and are now keeping saloons in the village of Grosse Pointe.

In construing the statute, the learned circuit judge expresses himself as follows:

"It seems to me, to resume, as far as the law is concerned, that a fair construction of the act indicates, first, a desire on the part of the legislature to limit the number

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of saloons in any municipality or village to 1 to every 500 of the population, with the further proviso that the city authorities or municipal authorities could reduce the number of saloons in each particular location, if they so desire. The act further indicates a desire not to cause this legislation to interfere with existing businesses. Therefore it is provided that the number of licenses in a particular muncipality may remain the same as there were saloons doing business at the time the act took effect, provided—and this is the significant language of the act, so far as its applicability to the case before me is concerned—that no license should be issued to any person to take the place of such license or licenses as shall have been revoked, or that shall voluntarily have been surrendered. It seems to me that language indicates an expression from the legislature of a method of reducing the number of saloons, where the number was in excess of the ratio prescribed."

If this is a proper construction of the law, and about that I express no opinion, then clearly the relator was not entitled to a license.

On the other hand, it is said the general object of the Warner-Cramton act, so called, is twofold:

(1) To gradually reduce the number of saloons in a municipality until the number should not exceed the ratio of 1 to each 500 inhabitants, according to the last United States census.

(2) To improve the personnel of those engaged in the traffic, and the character of the business.

If it is conceded that this is the proper construction, it is clear from this record that the village council did not attempt to accomplish either object; and that if we issue this writ as asked by the relator neither of those purposes will be accomplished. If the village council had attempted to accomplish the first of these objects, as it was its duty to do, it would have approved of but three licenses and three bonds; but it in fact at the one session approved four licenses and four bonds. If the village council had attempted to accomplish the second object, above stated, it would, when four applications were presented, have selected therefrom three persons who were most fit, and rejected

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the application of the fourth one. The record shows it did nothing of the kind, but, on the contrary, approved all four of the applications, without attempting to select the three most fit to conduct the business.

The result of the action of the council is that already the full number of saloons to which the village is entitled are now engaged in business. There is nothing in the record to show that relator's application was approved, first, because the village council thought he was one of the three most fit to engage in the business, or that the council attempted to improve the personnel of those engaged in the business by rejecting the most unfit.

If this court grants the writ of mandamus as requested, the effect will be to give to the village of Grosse Pointe four saloons; while the law says only three should be allowed to do business in that village. The application should be denied; but, as the rehearing was ordered by the court, it should be without the costs of this rehearing.

BLAIR, J., concurred with MOORE, C. J.

BLAIR, J. I concur in denying the writ. In my opinion, the circuit judge correctly construed the provisions of section 39 of Act No. 291 of the Public Acts of 1909 as giving a preference to retail liquor dealers engaged in business in April, 1909, over other applicants for licenses not so engaged. In construing a statute, it is the primary duty of the court to so interpret it as to give effect to the intention of the legislature. Applying this principle to the construction of the provisions in question, it appears to me to require the construction given by the circuit judge. To my mind, the provisions of this act clearly indicate an intention on the part of the legislature to protect the property of those engaged in business in April, 1909, against loss from being forced out of business, provided they possessed the qualifications for a license required by the statute, and to provide for a gradual reduction of the number by voluntary surrender and by revocation.

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Section 37 appears to me to strongly support this view. By that section, existing saloons within a certain distance of churches and schoolhouses, or in a residence district, are protected, although licenses are prohibited for the establishing of new bars or saloons within such limits. Section 39 provides that proper bonds shall be approved, not to exceed the number of dealers doing business in April, 1909:

"*Provided*, that if after this act takes effect the number of retail liquor dealers * * * shall be in excess of the ratio * * * no license or licenses shall be issued * * * to take the place of such license or licenses as shall have been revoked as in this act provided, or that shall voluntarily have been surrendered, until the ratio of the licenses granted, and the saloons * * * shall not exceed one saloon for every five hundred inhabitants," etc.

This act took effect September 1, 1909, and its provisions, relative to applications for licenses and bonds, relate, therefore, for the most part, to April, 1910, and ensuing years.

It appears to me, therefore, from the provisions quoted that it was the intention of the legislature that the township boards, etc., in April, 1910, should grant as many licenses and approve as many bonds as there were retail liquor dealers doing business in April, 1909, and still doing business in April, 1910, and that such number could only be reduced by voluntary surrender or by revocation. Unless this be the proper construction, the council or board, in April, 1910, could at once reduce the number of saloons to the statutory ratio, the power to do which would be inconsistent with the provisions now under consideration and with the proviso:

"*Provided further*, that said township board * * * may by ordinance limit the number of licenses to be granted; * * * but the number of licenses issued shall in no case exceed one to every five hundred inhabitants, * * * *except* as herein provided."

The only provisions to which this *exception* in the pro-

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viso can reasonably apply are those providing for licenses to be issued to the number of dealers doing business in April, 1909, which supports the interpretation above given, at least as to the number of dealers entitled to licenses. But, assuming that this interpretation is correct as to the number of dealers, does it follow that the dealers doing business in April, 1909, and still in the business when their applications for licenses are presented, are entitled to preference over other applicants desiring to engage in the business? It is argued that such construction is excluded by the proviso that if the applications exceed the maximum number "the township board or village or city council shall grant the maximum number and shall determine which of the applications so filed shall be granted."

If by this argument it is intended to indicate that the maximum number referred to is in accordance with the statutory ratio, without reference to the number in the business in April, 1909, it would seem to be opposed to the view expressed in the opinion of Justice STONE that the statute contemplates a gradual reduction of the number of saloons. As I understand his opinion, the dealers engaged in business in April, 1909, must be taken into account in determining the number of licenses to be granted, but not in determining to whom such licenses shall be granted; or, in other words, that the local legislature cannot reduce the number of saloons, except where the license has been revoked or voluntarily surrendered, but that, where there are 1,700 applicants and only 1,500 licenses can be granted, those applicants in the business possess no superior rights.

I think that the discretion vested in the local licensing body to determine to whom the licenses should be granted should be held to apply only to cases where, a local-option county having returned to sales of liquor, there are no dealers engaged in the business at all, and to cases where such licensing body has, by ordinance, changed the ratio, so as to provide for a less number of dealers, *e. g.*, 1 to 1,000 inhabitants, or to cases where the number of dealers in

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April, 1909, is less than authorized by the statute, or where, by revocations or surrenders, the original number has been reduced below the maximum, in which event the board may exercise its discretion as to whom it will license to bring the number up to the maximum.

I am firmly persuaded that the legislature, recognizing some elements of justice in the claim that the property of the men engaged in the business should receive some protection—a claim which, though not sustainable in law, had been and was vigorously asserted—and to avoid even the appearance of confiscation, intended by the somewhat contradictory provisions of this section to protect the dealers engaged in the business when the law took effect. I am very much strengthened in this view by the consideration that this must have been the intention of section 37. That section protects the particular saloon keeper in the particular saloon at a particular location, since any saloon located at a new place would be a new saloon, and a saloon at the same place, but by a new person, under a new license, would also be a new saloon. Furthermore, that the law relates to the dealer, and not to the place in which he deals, is indicated by the fact that it is the disqualification of the dealer which gradually diminishes the excess of saloons.

It is clear that the primary intention of the legislature was to limit the number of saloons. I can see a good reason for providing that such limitation should not affect the men already in the business, who should conduct their business with the propriety required by the statute. I can see no good reason for providing that the number of saloons shall not be reduced, except by revocations or surrenders, if all of the old dealers may be turned out, and an entire new set may be put in. Why should the legislature have any hesitation in providing that in 1910 the licensing board should issue the number of licenses required by the statutory ratio, which, in the judgment of the legislature, was a sufficient number, except to protect those already in the business? Again, I think, viewed

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from the standpoint of public policy, the same result must follow. A man whose right to continue in the business depends upon his own conduct of the business, regardless of his political influence, is far more likely to conduct his business properly than one who understands that, however upright his behavior, and no matter how closely he observes the law, however much he may have improved his property, and however great his investment, he is liable each year to be turned out of his business by some ward heeler with greater influence with his political boss. This is precisely what, in my view, the legislature sought to prevent.

MOORE, C. J., concurred with BLAIR, J.

PLOOF v. BANGOR TOWNSHIP BOARD.

INTOXICATING LIQUORS—LICENSES—STATUTES—SURRENDER—MANDAMUS—WORDS AND PHRASES.

Mandamus does not lie to compel a township board to grant an application for a retail liquor license, in a township of 1,249 inhabitants which had six saloons in April, 1909, and four at the time of relator's application, two licensees having failed to apply for a renewal; since Act No. 291, Pub. Acts 1909, was intended to reduce the number of saloons to a ratio of one for each 500 inhabitants, and the term "voluntary surrender" used in the law includes failure to renew licenses which have expired.

ON MOTION FOR REHEARING.

SAME—NEW APPLICANT.

Where it appeared, on a motion for rehearing, that the applicant for the license was a new applicant, but the license applied for had been issued to a liquor dealer during the preceding year, who had failed to apply for a renewal, the license was properly refused to relator.

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Certiorari to Bay; Collins, J. Submitted July 5, 1911. (Calendar No. 24,660.) Decided January 23, 1912. Rehearing denied March 29, 1912.

Mandamus by Philip Ploof against Bangor township board to compel the respondent to grant relator's application for a retail liquor license. An order issuing the writ is reviewed by respondent on writ of certiorari. Reversed.

Weadock & Duffy, for relator.

Pliny W. Marsh, for respondent.

BROOKS, J. Relator sought and secured from the circuit court a writ of mandamus requiring respondent—

"To meet forthwith and grant to relator a license as a retail liquor dealer in said township for the year commencing May 1st, 1911, and that said respondent approve such bond as presented by relator as shall conform to the requirements of law governing bonds of liquor dealers in this State."

Respondent has removed the case to this court for review by certiorari.

The controlling facts are as follows: The population of the township of Bangor according to the last United States census is 1,249. In April, 1909, there existed in said township six places duly licensed and maintained for the sale of liquor at retail. For the license term running from May 1, 1909, to May 1, 1910, but five licenses were issued in said township; one of the six licensees of the preceding year having failed to apply for a renewal, and there being no new applicant. For the year 1910–11 but four licenses were issued in said township, one of the five licensees of the preceding year not applying for a renewal, and there being no new applicant. For the year 1911–12 the four doing business during the preceding year applied for and received licenses. Relator likewise made application on April 21, 1911, for a license, and presented there-

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with a bond apparently conforming to the provisions of law. This application was rejected by the respondent board upon the ground that to grant it would be a violation of law.

The rights of the parties depend upon a construction of the words "voluntarily have been surrendered," contained in section 39, Act No. 291, Pub. Acts 1909.

"When applied for in accordance with the provisions of this act, bonds shall be approved by the local board, board of trustees, council or common council in each township, village and city for retail liquor dealers, not to exceed the number doing business in said township, village or city in the month of April, nineteen hundred nine. *Provided*, that if after this act takes effect the number of retail liquor dealers in any township, village or city shall be in excess of the ratio of one to each five hundred inhabitants, according to the last United States census, no license or licenses shall be issued to any person or persons to take the place of such license or licenses as shall have been revoked as in this act provided, or that shall voluntarily have been surrendered, until the ratio of the licenses granted, and the saloons in said township, village or city shall not exceed one saloon for every five hundred inhabitants thereof according to the last United States census."

It is the contention of the relator (and in this the learned circuit judge agreed with him) that there having been six duly licensed places for the sale of liquor at retail in operation in said township in April, 1909, and none having been revoked according to law, the failure to make application for one of those licenses during the year 1909–10, and for two during the year 1910–11, does not amount to a voluntary surrender of said licenses. It is urged that a license can only be surrendered by the holder thereof discontinuing the sale of liquor at retail thereunder while it is still in force, and that the mere failure of the holder (or another) to apply for a renewal thereof at the expiration of the term does not amount to a "voluntary surrender." We are unable to agree with this contention. A careful reading of the whole act (No. 291, Pub. Acts 1909), and particularly section 39 thereof, convinces us that the pri-

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mary object of the legislature was to work a gradual reduction in the number of saloons until that number should not exceed one to each 500 inhabitants. Two methods of reduction are provided in section 39—one by revocation and one by voluntary surrender. Nowhere in the act is the term "voluntary surrender" defined. We have no hesitation in holding that where a license expires by limitation, and neither the holder thereof nor any other duly qualified persons make application therefor before the beginning of the ensuing license year, that license must be held to have been voluntarily surrendered within the meaning of the act, and it cannot thereafter be renewed until, under the provisions of the law, the population of the municipality has grown sufficiently to warrant its issuance.

We think it obvious that the legislature had in mind the exact situation here presented. It failed to provide for a return of the unearned portion of the license if surrendered while yet in force, or to define what should constitute a surrender. It is, of course, clear that through lack of applications the number of saloons in the township of Bangor might be reduced to two, and that condition might continue for a number of years. If this were so, and there was no increase in the population, we think it would hardly be contended that simply because there were six saloons in operation in April, 1909, the number could be increased from two to six, thereby defeating the purpose of the legislation, and placing the business in that municipality back exactly where it was when the legislation was enacted.

The judgment is reversed, and the writ denied.

MOORE, C. J., and STEERE, MCALVAY, BLAIR, STONE, and OSTRANDER, JJ., concurred. BIRD, J., concurred in the result.

ON MOTION FOR REHEARING.

BROOKE, J. Our attention is called to the fact that in our former opinion, *ante*, 697 (134 N. W. 3), we reached our

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conclusion upon an erroneous understanding as to the facts. We gathered from the record, as it now appears erroneously, that relator's application was for a license which had been unissued to any person for an entire license year. It now appears that the license for which application was made by relator was in force from May 1, 1910, to May 1, 1911, but that the holder did not apply for a renewal thereof prior to its expiration. Relator made application therefor; and it is his contention that, being a "duly qualified person," he was entitled to the writ of mandamus under the intimation contained in our former opinion.

Had the facts been as we understood them, it is obvious that it was unnecessary to determine more than that, under the case *there presented*, relator was not entitled to the relief sought. Under the situation actually presented, we must decide whether a new applicant is entitled to take the place of the holder of a license, when the old holder declines, for any reason, to ask for a renewal thereof, where the ratio of saloons to population is greater than 1 to 500.

After mature deliberation, we have concluded that he has no such right. We do not mean by this to say that such new applicant may not be granted a license in the place of an old licensee, under the power of selection vested in the licensing body; but we are of opinion that the total number of licenses to be granted must be held to have been diminished by one on account of the failure of an old holder to apply for a renewal; that as to that license it must be held to have been voluntarily surrendered, within the meaning of the act. We are led to this conclusion by a consideration of the evident purpose of the legislature, as evidenced by the whole act, which was to gradually work a reduction of the number of saloons until they reached the ratio fixed by the statute, and to effect this end without undue hardship to those already engaged in the business. It is, we think, clear that, but for this latter consideration, the legislature would have at once fixed the number of licenses to be granted at the statutory ratio.

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These conclusions do not necessarily mean that the legislature sought to, or did in fact, create a property right in the holder of a license to a renewal thereof. It means only that, so long as the holder of a license is able to meet the requirements of the licensing body, and move it to exercise its discretionary power of selection in his behalf, he shall be permitted to remain in the business, even though by so doing the number of saloons continues to be higher than the ratio fixed by the statute. When he fails to apply for a renewal, then the number to be granted is reduced by one, if the number in force is greater than the statutory ratio. Any other construction would clearly prevent any *sensible* reduction in the number of saloons, to effect which was, as we have seen, the cardinal object of the legislation.

Our former conclusion denying the writ is affirmed.

STEERE, MCALVAY, STONE, OSTRANDER, and BIRD, JJ., concurred with BROOKE, J.

MOORE, C. J. I concur in the result but do not approve of the language, which I regard as dictum in this case.

BLAIR, J., concurred with MOORE, C. J.

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INDEX.

ABANDONMENT.

Desertion of a wife by the husband takes place in the county of which the wife is a legal resident, and in which she becomes dependent, so that a prosecution under Act No. 144, Pub. Acts 1907, is properly brought in the county of her legal residence although the husband never lived there. *In re Price*, 527.

ABATEMENT AND REVIVAL.

1. After the filing of a stipulation discontinuing a foreclosure suit by mutual consent, the proceedings were not a bar to a second foreclosure suit in which defendant, by plea in abatement, set up the pendency of the first proceeding alleging that no final order of dismissal had been entered by the court. *Chronowski* v. *Zielinski*, 590.

2. And an order entered in the first cause, after the plea in the second cause was filed, discontinuing the suit as of the date of the stipulation, operated as a formal discontinuance at the time of filing the stipulation. *Id.*

ABROGATION OF RULE—See MASTER AND SERVANT (4, 5).

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AGENCY—See PRINCIPAL AND AGENT.

ALIGHTING FROM CAR—See CARRIERS (3, 4); STREET RAILWAYS (2).

ALIMONY—See DIVORCE.

AMENDMENTS.

The order of a circuit court, on appeal from justice's court, permitting the defense to file an affidavit denying the execution of a written contract, was within the court's discretion, on a showing by defendant that he first saw the alleged contract at the trial below. *International Text-Book Co.* v. *Roberts*, 501.

See APPEAL AND ERROR (9); CONSTITUTIONAL LAW (5); CRIMINAL LAW (8); MUNICIPAL CORPORATIONS (4).

ANIMALS—See STREET RAILWAYS (3, 6, 7).

APPEAL AND ERROR.

1. Two cases, heard as one upon a single bill of exceptions that by stipulation counsel used in both cases, are ordered struck from the docket because the printed record contains no assignments of error, references to the record appear in blank, the index is omitted from the record in one case and the record and briefs are very uncertain and confusing. *In re Baluss' Estate*, 132.

2. Though the court's charge, in an action by architects for compensation, was not clear or comprehensive, the verdict, which was not against the weight of the evidence, is affirmed, the issue being simple and no requests having been presented by appellant. *Baxter* v. *Cowhey*, 144.

3. On review of a judgment entered after a trial by the court without a jury, where no written request for findings is filed, and findings in writing have been made, they will be presumed to have been made upon request and have the same effect as if requested. *White* v. *U. S. Gypsum Co.*, 288.

4. As every finding is one and entire and stands in lieu of a special verdict, the appellate court should accept everything evidently intended as facts found wherever set forth; it will not invalidate the findings that those of fact have not been separated from the conclusions of law. *Id.*

5. Findings of fact determining that no contract of hiring was executed between plaintiff and defendant are sustained as being supported by evidence. *Id.*

6. Exceptions to argument of the prosecutor taken without any request for a ruling by the court were insufficient to warrant a reversal. *People* v. *Sartori*, 309.

7 Where the court is asked to rule, and neglects or omits to do so the effect is the same as an adverse ruling upon the objection. *Id.*

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APPEAL AND ERROR—Continued.

8. A demurrer for multiplicity, inconsistency, and insufficiency of a bill to declare certain conveyances given as security for a debt and to redeem therefrom is a special demurrer; and an order overruling it is not appealable. *Case* v. *Longyear*, 434.

9. The proper practice to review the action of the circuit court in refusing to include in a bill of exceptions matter desired by appellant is by proposing an amendment to the bill as settled and reviewing by mandamus the refusal of the judge. It is not a correct method to move to remand the record for correction after the issuance of a writ of error. *McIntire* v. *Carr*, 462.

10. In assigning error by setting out the charge of the court which contained conclusions of fact as well as of law and directed a verdict for plaintiff, the defendant's objection that the court erred in so instructing the jury, was not sufficiently specific. *Weston* v. *Dunn*, 563.

11. In order to review a finding of facts and law made by the circuit judge sitting without a jury, appellant should file exceptions within four days unless further time is granted; and such exceptions should be settled and incorporated in the bill of exceptions. Circuit Court Rule 26. *Rameau* v. *Valley*, 569.

12. In considering, on error, a case for personal injuries of an employé against whom a verdict was directed by the trial court, defendant's evidence does not require consideration: the question is whether plaintiff's evidence, given its strongest probative force, was sufficient to support a verdict. *Prisel* v. *Coney*, 602.

13. Plaintiff's motion for a rehearing having been granted and the case reargued, his judgment is affirmed on the ground that the error in the court's charge on which the judgment was reversed by the original opinion in this cause was waived by appellant's failure to assign error upon the objectionable portion of the charge or to refer to the point in its brief. Supreme Court Rule 40. *Nissly* v. *Detroit, etc., R. Co.*, 677.

See AMENDMENTS; CERTIORARI; CRIMINAL LAW (1, 6); EJECTMENT (5); LIBEL AND SLANDER (3); MANDAMUS; MORTGAGES (2, 5); PLEADING (6); TRIAL (6).

APPEARANCE—See PROCESS (2).

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ARBITRATION—See EXECUTION.

ARCHITECTS—See APPEAL AND ERROR (2); CONTRACTS (1, 4).

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ARGUMENT OF LEGAL QUESTIONS—See EQUITY (5).

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ARREST.

Upon undisputed testimony that plaintiff used foul language to and assaulted an officer, that the officer in the course of the affray repeatedly stated he was trying to arrest the man and called for help, that he told plaintiff several times he wanted to arrest him, told him to come on, and that he requested others to assist in arresting plaintiff, the court should have charged, as a matter of law, that plaintiff was under arrest, and the question should not have been submitted to the jury. *Buman* v. *Michigan Cent. R. Co.*, 651.

See CARRIERS (13).

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ASSIGNMENTS OF ERROR—See APPEAL AND ERROR (1, 13); EJECTMENT (5).

ASSUMPSIT.

1. A count in a declaration purporting to be in case, charging that defendants, some of whom were creditors of plaintiff, as such, agreed that if plaintiff would permit a certain firm of adjusters to adjust plaintiff's loss by fire with several insurance companies that had issued policies to him, plaintiff might deposit the proceeds in a bank named by them, that instead of depositing the funds as agreed, the defendants, wilfully intending to injure plaintiff and deprive him of his policies of insurance, procured and permitted said adjusters to appropriate to their own use $10,000 of the funds collected, stated, in the absence of a demurrer, a sufficient cause of action in assumpsit instead of trespass on the case. *Dillon* v. *Craig*, 216.

2. A second count, charging similar facts and alleging false pretenses, stated a cause of action for fraud, sufficient if not demurred to. *Id.*

3. The misjoinder of causes of action should be raised by an appropriate pleading, but upon a motion to require an election between the counts, made at the commencement of the trial and again at the close of plaintiff's case, plaintiff should have been required to elect between them. *Id.*

See MUNICIPAL CORPORATIONS (1).

ASSUMPTION OF RISK — See MASTER AND SERVANT (14, 31); RAILROADS (4).

ATTACHMENT—See JUSTICES OF THE PEACE.

ATTESTATION—See WILLS (1, 3).

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ATTORNEY AND CLIENT.

1. General and special demurrers to a petition for disbarment that charged respondent with refusing to account to the probate court as executor, with disobedience to specified orders of the court, with converting property of the estate to his own use, and other misconduct, were not sustainable on the theory that such petition was not sufficiently clear and specific, and was properly overruled. *In re Radford*, 474.

2. Formal allegations charging specifically acts of malpractice, etc., are not essential to the sufficiency of the petition, and if fair notice is given to the respondent of the nature of the charges and a reasonable opportunity for defense afforded, the proceedings are not open to objection. *Id.* 475.

3. Testimony taken at the hearing before the circuit court was not required to be read over to and signed by the respective witnesses. *Id.*

4. Evidence showing that an attorney at law, appointed as executor of an estate, failed to file an inventory and account, disobeyed numerous orders of the probate court without excuse, retained funds of the estate in his hands for upwards of eight years, invested money of the estate in his own name in real property which he mortgaged and lost upon foreclosure proceedings, and was guilty of deceit towards the persons interested in the estate, sufficiently supports a finding that the attorney was guilty of unprofessional and immoral conduct requiring his disbarment. *Id.*

5. Nor was it necessary that he be first convicted of criminal misconduct. *Id.*

6. When an attorney has forfeited his claim to the office by such misconduct, professional or nonprofessional, in or out of court, as to render him unworthy, unfit, or unsafe to be entrusted with the duties and responsibilities of his profession, the court is justified in removing him from the bar. *Id.*

7. Parol evidence was not admissible, in a personal injury action which the client compromised without the consent of his attorneys, and which was thereafter prosecuted by the attorneys for their fees, to show that a written instrument executed by plaintiff and defendant purporting to be a settlement of the entire cause of action, was actually a settlement of an undivided half of plaintiff's claim. *Foley* v. *Grand Rapids, etc., R. Co.*, 496.

8. Under a contract giving the attorneys a lien on the moneys obtained by any settlement without depriving the client of the right to enter into a compromise against their consent, as soon as the amount of settlement was agreed upon, the attorneys became entitled to the percentage thereof fixed by the instrument. *Id.*

9. Judgment was properly directed for defendant who had tendered and paid into court the correct sum due plaintiff's attorneys. *Id.*

See CERTIORARI; ESTOPPEL (1); TRIAL (5).

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AUTOMOBILES.

1. In the exercise of the police power the legislature is authorized to regulate the operation of automobiles on the public highways. *Johnson* v. *Sargeant*, 444.

2. The statute (Act No. 318, Pub. Acts 1909) does not contemplate that an action should be brought and judgment obtained against the driver of the automobile before the commencement of proceedings against the owner. *Id.*

See CARRIERS (11, 12); FRAUD (5, 6); MASTER AND SERVANT (21); SALES (11).

Liability of owner of, see CONSTITUTIONAL LAW (6).

AUTOPSY—See EVIDENCE (15).

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BILL OF PEACE—See EQUITY (1).

BOARDING CAR—See CARRIERS (5, 7).

BOARD OF REVIEW—See TAXATION.

BONDS—See MUNICIPAL CORPORATIONS (5, 9).

BOOKS—See EVIDENCE (2, 5).

BOUNDARIES.

1. Where several lots described by number in the government survey lay contiguous to a channel of one of the Great Lakes, and fronted upon the water, which by receding left accretions not divided by the survey among the several lots, and by the recession of the water plaintiff's lot became separated from the water line so that the meridian line constituting the section line east of his lot passed between the plaintiff's premises and the shore, leaving the new land adjacent to a lot on another section and range, it could not be held, as a matter of law, that plaintiff acquired no rights by accretion beyond the meridian line, in the adjoining section and range. *Weston* v. *Dunn*, 563.

2. Having possession of the disputed land, the plaintiff was entitled to maintain trespass against defendant who tore down a fence, and entered the close without being able to show title to the premises. *Id.*

BREACH OF CONDITION—See INSURANCE (6); SALES (5).

BREACH OF INSURED—See INSURANCE (7).

BROKERS.

Testimony having a tendency to show that a wife knew that her husband assumed to act for her in placing property of the wife in a broker's hands and acquiesced in the arrangement, and was shown a copy of the contract of exchange

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BROKERS—Continued.

finally entered into with a purchaser, required the submission to the jury of her liability for commissions. *Crane* v. *Ross*, 624.

See EVIDENCE (17, 18); FRAUD (1); VENDOR AND PURCHASER (2).

BUILDING CONTRACTS—See CONTRACTS (1).

BURDEN OF PROOF—See EVIDENCE (1); FRAUD (8); LIBEL AND SLANDER (10).

CANCELLATION OF INSTRUMENTS—See DEEDS.

CARRIERS.

1. Where a passenger on defendant's train paid his fare, and the conductor, in placing the slip in his hat, by mistake indicated the wrong station, and later ejected the passenger who claimed that he attempted to explain the circumstances to the conductor but was not permitted to, it was not necessary for him to pay his fare the second time to avoid ejection; it also appearing that the conductor had in his possession a slip and evidence of the amount paid, which he could have readily examined and ascertained plaintiff's rights. *Burnham* v. *Detroit, etc., R. Co.*, 55.

2. A judgment of $350 was not excessive for ejecting a passenger by the use of force, accompanied by abusive, profane, and improper language in the presence of plaintiff's wife and other passengers. *Id.*

3. It is the duty of employés in charge of a street car to ascertain who and how many of the passengers intend to alight at a place where the signal has been given to stop, and to wait a sufficient time to allow them to alight in safety, in the exercise of reasonable diligence, and such employés are required to see and know that no passenger is in a perilous position when the car is started. *Keeley* v. *City Electric R. Co.*, 79.

4. After the car has waited a reasonable time for passengers to alight, and no passenger is in the act of leaving the car, and the conductor has no notice or knowledge of the intention of a passenger to alight, it is not negligence to give the signal to start. *Id.*

5. It is the duty of the conductor, before signaling to proceed, to look about and ascertain that all passengers are safely on board. *Id.* 80.

6. And a passenger, riding on the platform of a crowded car or trailer, might be warranted in stepping to the ground when the car stopped and upon the rear platform of a preceding car in the same train. *Id.*

7. Nor was an infant nine years old guilty of contributory negligence, as a matter of law, for leaving the platform on which he was riding and attempting to board the next car at a stopping place, though he did not know why the cars stopped, did not see any one attempting to leave or enter the car, and did not know where the conductor was. *Id.*

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CARRIERS—Continued.

8. It could not be said, as a matter of law, that the conductor need not anticipate that plaintiff would leave his position and try to secure another. *Id.*

9. The carrier is not an insurer of the safety of passengers. *Id.*

10. Where counsel for plaintiff, in the course of a somewhat inflammatory argument, stated that it was defendant's duty to see that plaintiff, an infant, had a safe position in which to ride, and the court, interrupting, stated that he could not so instruct the jury, but permitted counsel to proceed further with his argument, and in the course of his charge permitted the jury to take into consideration the claims of the respective attorneys without advising the jury to consider only the law as laid down by the court, a verdict which was opposed to the weight of the evidence is reversed and a new trial ordered. *Id.*

11. A passenger in the taxicab of a common carrier, injured by the concurrent negligence of the chauffeur and of agents of another carrier, is not barred from recovering against the other by the negligence of the driver of the taxicab. *Galloway* v. *Detroit United Ry.*, 343.

12. Evidence that a street car was backed without warning from the main track upon a switch or Y across a portion of the street, while the conductor was in the forward end of the car, and no lookout was being maintained, tended to show negligence of the street railroad company contributing to a collision with a taxicab in which plaintiff was riding. *Id.*

13. The relation of passenger and carrier did not exist between a railroad company and one who, intending to purchase a ticket, alighted from an interurban car of another corporation, proceeded several blocks towards defendant's station where he paused outside, gave money to an employé of defendant, not the ticket agent, and requested him to purchase a ticket, when the intending passenger was arrested for being drunk and disorderly, and engaged in a quarrel with the police officer. *Buman* v. *Michigan Cent. R. Co.*, 651.

See CONSTITUTIONAL LAW (1-3); MASTER AND SERVANT (35); STREET RAILWAYS (2).

CASE—See ASSUMPSIT (1).

CASH FARES—See CARRIERS (1).

CERTIORARI.

The writ of certiorari to review proceedings for the disbarment of an attorney at law (3 Comp. Laws, § 10497), brings before the Supreme Court for review only questions of law, not of fact; and the court will examine the evidence only to determine whether it justifies the finding of the court as a legitimate inference therefrom. *In re Radford*, 474.

CHANCERY RULES—See MORTGAGES (1).

CHANGED CONDITIONS—See MASTER AND SERVANT (16).

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CHANGE IN OWNERSHIP—See INSURANCE (8–13).

CHARTERS—See MUNICIPAL CORPORATIONS (4, 7).

CHATTEL MORTGAGES.

An affidavit attached to a chattel mortgage, sworn to but not subscribed, is sufficient. Act No. 332, Pub. Acts 1907. *Rameau* v. *Valley*, 569.

See INSURANCE (1, 2).

CHILD LABOR LAW—See MASTER AND SERVANT (23).

CITIES—See CONSTITUTIONAL LAW (4, 5); MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL DISTRICTS.

CIVIL-DAMAGE ACT—See INTOXICATING LIQUORS (9, 10); NEW TRIAL (1).

COLOR OF TITLE—See EJECTMENT (3).

COMMENCEMENT OF ACTIONS—See CORPORATIONS; VENUE.

COMMISSIONS—See BROKERS; EVIDENCE (17).

COMMON COUNCIL AS BOARD OF REVIEW—See TAXATION.

COMMON COUNTS—See CONTRACTS (11).

COMMON LAW—See PLEADING (3).

COMPETENCY OF EMPLOYÉS—See MASTER AND SERVANT (22).

COMPROMISE AND SETTLEMENT—See ATTORNEY AND CLIENT (7, 8); ESTOPPEL (5); EVIDENCE (18); INSURANCE (3).

CONDEMNATION PROCEEDINGS—See INJUNCTION (4).

CONDITIONAL ESTATES—See WILLS (4)

CONDITIONS PRECEDENT—See ATTORNEY AND CLIENT (5); AUTOMOBILES (2).

CONDUCT OF COUNSEL—See TRIAL (2, 4, 5).

CONFESSION—See EVIDENCE (10).

CONFIRMATION OF SALE—See EQUITY (3).

CONSIDERATION—See CUSTOMS AND USAGES (1).

CONSTITUTIONAL LAW.

1. An order of the Michigan railroad commission requiring the Michigan Central Railroad, a steam road, and the Detroit United Railway, an electric railway, to install a connecting track between the two roads in the village of Oxford, Michigan, and to interchange freight cars and passenger traffic, is not in violation of the commerce clause of the Federal Constitution (Art. 1, sec. 8, subd. 3), since the order must be deemed to affect only intrastate traffic, which is within the

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CONSTITUTIONAL LAW—Continued.

jurisdiction of the commission. (Act No. 312, Pub. Acts 1907; Act No. 300, Pub. Acts 1909.) *Michigan Railroad Commission* v. *Michigan Cent. R. Co.*, 230.

2. Said act creating the commission and authorizing it to act in such cases does not deprive respondent of its property without due process of law; subdivision *c* of section 7 containing a provision for reasonable compensation to the carrier. *Id.*

3. The questions of the practicability of the physical connection and interchange of traffic and of the reasonableness of the service being reviewable only by proceedings in chancery under section 26, Act No. 312, Pub. Acts 1907, are not open for determination in mandamus to compel the carrier to conform to the order of the Michigan railroad commission. *Id.*

4. The Constitution delegates to the electors of cities and villages, not to the legislature, authority to determine for themselves the local laws which shall regulate their municipal affairs. *Attorney General, ex rel. Vernor*, v. *Common Council of the City of Detroit*, 249.

5. Section 21 of Act No. 203, Pub. Acts 1911, authorizing cities to amend their charters without revising them under the Constitution, and statutes passed pursuant thereto, is invalid. *Id.*

6. The title of Act No. 318, Pub. Acts 1909, being "an act providing for the registration, identification and regulation of motor vehicles operated upon the public highways of this State," is sufficiently broad to warrant the provision contained in the law rendering an owner liable for the negligent acts of the operator of his car. *Johnson* v. *Sergeant*, 444.

7. And it was not beyond the power of the State to make the owner absolutely liable. *Id.*

8. Act No. 302, Local Acts 1911, amending the existing charter of the city of Detroit by extending the limit of municipal indebtedness from two to three per cent. of the assessed valuation, is invalid: under the Constitution the charter may only be amended by general revision, and the statute, being a local act, is in excess of the legislative authority, since a general act could be made applicable. Const. art. 5, § 30. *Attorney General, ex rel. McRae*, v. *Thompson*, 511.

See CRIMINAL LAW (3); INTOXICATING LIQUORS (3, 5); NEW TRIAL (2); SCHOOLS AND SCHOOL DISTRICTS (4).

CONSTRUCTION OF CONTRACTS—See CONTRACTS (1, 2); SALES (1, 3).

CONSTRUCTION OF LEASE—See LANDLORD AND TENANT (2, 5, 6).

CONSTRUCTION OF STATUTES—See MUNICIPAL CORPORATIONS (7, 8); STATUTES.

CONSTRUCTION OF WILLS—See EVIDENCE (21); WILLS (4-9).

CONTINGENT REMAINDERS—See WILLS (6).

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CONTRACTS.

1. Under the provisions of a contract to install heating apparatus in a church as specified therein, plaintiff to cover all pipes underground so as to protect them from freezing, he was not bound to cover pipes under the church but not underground, and work done in protecting such pipes at the request of the architect was an extra. *Wenzel* v. *Kieruj*, 92.

2. The construction of the writing was for the court, not the jury. *Id.*

3. Parol agreements and statements made prior to the execution of the written instrument could not be shown to vary its terms. *Id.*

4. But plaintiff was entitled to have submitted to the jury his claim, which was supported by testimony, that defendant and its architect authorized him to protect the pipes after the execution of the contract, and agreed to the charge therefor as an extra. *Id.*

5. The necessary elements of a valid contract were lacking between the contractor and the directors, since their undertaking did not extend to the entire cost of sinking the shaft, but to preliminary work, which was not determined by the arrangement. *Detroit Sav. Bank* v. *Loveland*, 168.

6. When negotiations for a contract are pending, the law will not imply a contract upon which the minds of the parties have not met. *White* v. *U. S. Gypsum Co.*, 288.

7. The rendition of services of a different character from those which had been previously rendered by an employé, whose contract had expired, afford no presumption that his former contract is renewed. *Id.*

8. Where plaintiff was engaged by defendant under a three-year contract of hiring, which the parties later canceled by consent, and plaintiff was re-engaged at a stated salary for the remainder of the year, except two months, and where plaintiff, before the expiration of the year, attempted to renew his employment, rendering services of a different character while negotiations pended, a contract of hiring, express or implied, for the following year was not proved. *Id.* 289.

9. Since the object of Act No. 101, Pub. Acts 1907, is to protect the public from fraud and to provide a means of ascertaining the identity of the owners of a business conducted under a fictitious or trade name, and a violation of its terms is forbidden under penalty, a contract made by a partnership engaged in contracting, etc., under a fictitious name without filing in the office of the county clerk a certificate showing the names of the members of such firm, was unenforceable in behalf of the partnership because tainted with illegality. *Cashin* v. *Pliter*, 886.

10. As to innocent third parties who have dealt with the firm in ignorance of any illegality, the statute does not take away their rights. *Id.*

11. The statute equally precludes a recovery under the common

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CONTRACTS—Continued.

counts for materials furnished by the copartners without complying with the law. *Id.*

12. When an agreement has been expressed the law cannot imply one. *Id.* 387.

13. When plaintiff made no claim of recovery on any other than the contract in writing declared upon, and defendant denied its execution, claiming to have made a different oral contract, which he contends plaintiff had broken, the court committed prejudicial error in admitting evidence of a breach of any other agreement than the written instrument. *International Text-Book Co* v. *Roberts*, 501.

14. And the court erred in receiving evidence of parol promises or statements of plaintiff's soliciting agent having some tendency to vary and to contradict the writing. *Id.*

15. Except as to the question of the execution of the written contract, which was a question of fact, the plaintiff was entitled to peremptory instructions in its favor for the amount of damages agreed upon and stipulated by the parties. *Id.*

See AMENDMENTS; APPEAL AND ERROR (5); ATTORNEY AND CLIENT (7, 8); BROKERS; CUSTOMS AND USAGES; ESTOPPEL (3); EVIDENCE (17); INSURANCE (9); INTOXICATING LIQUORS (2); PARTNERSHIP ASSOCIATIONS (1); SALES (1, 5, 6, 8, 9, 11-13); VENDOR AND PURCHASER.

CONTRIBUTORY NEGLIGENCE—See CARRIERS (7); HIGHWAYS AND STREETS; MASTER AND SERVANT (6, 11, 19, 32); RAILROADS (1); STREET RAILWAYS (1, 2).

CONVERSION—See ASSUMPSIT (1); ESTOPPEL (5).

CONVEYANCES—See LANDLORD AND TENANT (2); TRUSTS (4, 5).

CORPORATE DIRECTORS OR AGENTS—See INSURANCE (10).

CORPORATIONS.

1. A resident of Missaukee county, claiming to have been injured in Oakland county, into which defendant's electric railway lines extend, could institute an action in that county, where it maintained stations and ticket agents, though the principal place of business of the corporation was in the county of Wayne. 2 Comp. Laws, § 6454; 3 Comp. Laws, §§ 10022, 10468; Act No. 206, Pub. Acts 1901. *Pollock* v. *Detroit United Ry.*, 581.

2. For purposes of jurisdiction the corporation is deemed a resident of any county where the road is operated or corporate powers exercised, and of each county where it has an office, agency, or agent for service of process. *Id.*

See CONTRACTS (5); ESTOPPEL (3).

CORRECTION OF BILL OF EXCEPTIONS — See APPEAL AND ERROR (9).

CORROBORATIVE EVIDENCE—See EVIDENCE (7).

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COUNTS—See ASSUMPSIT; PLEADING (1, 4).

COUNTY TREASURERS—See LIBEL AND SLANDER (7).

COURT RULES—See MORTGAGES (1); PLEADING (6).

COVENANTS—See LANDLORD AND TENANT (1).

CREDITOR'S SUIT.

1. The levy of execution upon specific property is a prerequisite to the jurisdiction of equity upon a bill in aid of execution. *Schelowski* v. *Pawlowski*, 664.

2. An averment of the bill that an alias writ of *fieri facias* was issued, delivered to the sheriff, and duly served by him, followed by a paragraph stating that the sheriff attempted to levy said execution upon real estate described, when he discovered that the property had been fraudulently transferred, etc., is insufficient to support the jurisdiction of the court of equity. *Id.*

CRIMINAL CHARGE—See LIBEL AND SLANDER (7, 10).

CRIMINAL LAW.

1. A conviction upon a charge of violating a village ordinance is not reviewable on exceptions before sentence. *People* v. *Kohler*, 148.

2. That counsel for respondent, who was accused of murder, was not permitted to examine a juror as to the state of his health, was not error, in the absence of a showing that his health or physical condition affected his verdict, which was rendered after a short trial. *People* v. *Oblaser*, 227.

3. Act No. 4, Pub. Acts 1909, authorizing the court to permit the jury in criminal trials to separate, is constitutional as an amendment to 3 Comp. Laws, § 11960, the title of which refers only to murder cases: for the court had such power in other criminal causes prior to the amendment, which therefore only affects prosecutions for murder, and is within the title of the original act. *Id.*

4. Argument of the prosecuting attorney that did not clearly distinguish between facts, and inferences which he drew from them, was not prejudicial error on the trial, which resulted in a just verdict. *Id.*

5. The objection that respondent had no preliminary examination was presented too late, on motion for a new trial; and the respondent waived the right by declining to take the stand when asked if he desired to do so by the court. *People* v. *Sartori*, 309.

6. The court will not consider piecemeal a request to charge which was refused, and which is not claimed to have been, as a whole, erroneously refused. *Id.*

7. *Held*, on a consideration of the entire record, that the verdict was not against the weight of the evidence. *Id.*

See ABANDONMENT; ARREST; CARRIERS (13); EVIDENCE (10, 13); HOMICIDE; INTOXICATING LIQUORS (6, 8).

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CROPS—See CUSTOMS AND USAGES; REPLEVIN (1).

CROSS-EXAMINATION—See TRIAL (1, 8); WITNESSES.

CROSSING ACCIDENT—See RAILROADS (1); STREET RAILWAYS (1, 2).

CUSTOMS AND USAGES.

In an action of replevin for hay, which plaintiff grew on defendant's land under an arrangement which was silent as to the amount and method of compensating plaintiff for his services, evidence of a custom in the community to divide the hay in equal shares was properly admitted. *Cronk* v. *Mulvaney*, 347.

See MASTER AND SERVANT (5, 6).

DAMAGES—See CARRIERS (2); CONTRACTS (15); FRAUD (3); INJUNCTION (2); INTOXICATING LIQUORS (9); LANDLORD AND TENANT (3); LIBEL AND SLANDER (3–6); MASTER AND SERVANT (33); NEW TRIAL (2); SALES (5).

DANGEROUS EMPLOYMENT—See MASTER AND SERVANT (23–25, 34).

DANGEROUS MACHINERY—See EVIDENCE (7); MASTER AND SERVANT (24, 25, 34).

DEATH—See EVIDENCE (4); PLEADING (5); RAILROADS (2, 4).

DEBTOR AND CREDITOR—See ESTOPPEL (3, 5); PARTNERSHIP ASSOCIATIONS (1); TROVER AND CONVERSION; TRUSTS (1, 2).

DECEIT—See FRAUD.

DECLARATIONS AGAINST INTEREST—See EVIDENCE (13).

DECREE—See DIVORCE (3, 4); EQUITY (4); MORTGAGES (2).

DEED AS MORTGAGE—See APPEAL AND ERROR (8).

DEEDS.

A conveyance of real property worth $1,200 and of personal property worth $1,000, procured by defendant while complainant, the grantor, was in an intoxicated condition brought about by defendant, who paid only $700 for the property, was fraudulent and properly set aside in equity. *Scanlon* v. *Connor*, 133.

See LANDLORD AND TENANT (2).

DEFECTIVE APPLIANCES—See MASTER AND SERVANT (10, 26–30, 34).

DEFECTIVE INSULATION—See EVIDENCE (14)

DEFECTS IN ROADS—See HIGHWAYS AND STREETS.

DEFENSES—See EJECTMENT (1); PARTNERSHIP ASSOCIATIONS (3).

DELAY—See SALES (3).

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DEMAND—See REPLEVIN (2).

DEMURRER — See APPEAL AND ERROR (8); ASSUMPSIT; ATTORNEY AND CLIENT (1); EQUITY (6); PLEADING (2); QUO WARRANTO (2); VENUE (3).

DEPOSITIONS—See VENUE (1).

DEPOTS—See INJUNCTION (1, 3).

DESCENT AND DISTRIBUTION—See INTERPLEADER (3).

DESERTION—See ABANDONMENT.

DETROIT CHARTER — See CONSTITUTIONAL LAW (8); MUNICIPAL CORPORATIONS (4, 7).

DETROIT LIBRARY COMMISSION — See SCHOOLS AND SCHOOL DISTRICTS (1).

DEVISES—See WILLS.

DIRECTED VERDICT—See APPEAL AND ERROR (10, 12); BROKERS; CONTRACTS (15); MASTER AND SERVANT (27); RAILROADS (4); SALES (10); WILLS (3).

DIRECTING VERDICT ON OPENING STATEMENT—See FRAUD (1).

DISBARMENT PROCEEDINGS — See ATTORNEY AND CLIENT (1–6); CERTIORARI.

DISCONTINUANCE—See ABATEMENT AND REVIVAL.

DISMISSAL OF BILL IN CHANCERY — See ABATEMENT AND REVIVAL (1).

DISORDERLY CONDUCT—See CARRIERS (13); MASTER AND SERVANT (35, 36).

DISTRIBUTION—See WILLS (7–9).

DIVORCE.

1. While the court in a divorce suit has authority to award alimony out of real property owned by the entirety, the interest of the wife cannot be diminished. 3 Comp. Laws, § 8640. *Brasch* v. *Brasch*, 459.

2. A sum in excess of the value of the wife's interest will be presumed to have been awarded in lieu of dower under Act No. 259, Pub. Acts 1909. *Id.*

3. Twelve hundred dollars awarded to the wife in gross is not inadequate out of property of the husband and out of the joint estate to neither of which had the wife contributed, where the entire property was worth about $5,000, was subject to certain mortgages aggregating $900, and where the husband was much older than the wife and had six children dependent on him. *Id.*

4. But it was not a proper method to secure the payment of ali-

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DIVORCE—Continued.

mony to decree that the husband execute a second mortgage, maturing in three years at six per cent. interest, upon the joint estate; in lieu whereof it is ordered that the alimony be paid in sixty days, and that it constitute a lien on all the real and personal property. *Id.*

DOWER—See DIVORCE (2).

DUE PROCESS OF LAW—See CONSTITUTIONAL LAW (2).

DUPLICITY—See PLEADING (3).

DURESS—See EVIDENCE (10).

EDUCATION—See SCHOOLS AND SCHOOL DISTRICTS.

EJECTING PASSENGERS—See CARRIERS (1, 2).

EJECTMENT.

1. In ejectment, plaintiff must recover on the strength of his own title, not on the weakness of defendant's. *Powell* v. *Pierce*, 427.

2. Defendant in ejectment who purchased his title of a tax purchaser by warranty deed had no right of entry upon the lands until a sufficient notice was served. 1 Comp. Laws, § 3961. *Id.*

3. Being without color of title, he may not recover for alleged improvements under the provisions of section 3927, 1 Comp. Laws; being a trespasser his rights are not affected by section 10995, 3 Comp. Laws, authorizing compensation for improvements in ejectment, to the extent that they have increased the value of the land. *Id.*

4. Plaintiff could not recover possession of unoccupied and uncultivated land in ejectment without tendering to the register of deeds the amount of taxes for which the property was twice sold to the State. *Id.* 428.

5. By an assignment of error that the court erred in holding that plaintiff was the owner of the premises, entitled to possession thereof, the point was properly raised on error, though the correct reason was not presented to the trial court. *Id.*

ELECTION OF COUNT—See ASSUMPSIT (3).

ELECTIONS—See MUNICIPAL CORPORATIONS (4).

ELECTRICITY — See EVIDENCE (14); MASTER AND SERVANT (30–32).

ELEVATORS—See MASTER AND SERVANT (26–28).

EMBEZZLEMENT—See LIBEL AND SLANDER (7).

EMINENT DOMAIN—See INJUNCTION (1, 4).

ENROLLMENT OF DECREE—See EQUITY (3, 4).

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EQUITY.

1. A landlord who has successively leased the same premises to different persons may not compel them to answer a bill in equity on the ground that it would avoid a multiplicity of suits. *Detroit Trust Co.* v. *Hunrath*, 180.

2. Nor is the guardian of one of the heirs succeeding to an interest in such premises entitled to litigate the rights of the respective tenants as joint defendants in equity, on the theory that such guardian is entitled to instructions from the court. *Id.*

3. Where a decree of foreclosure was rendered in 1891, the premises sold and the sale reported by the circuit court commissioner in 1892, the court, upon the petition of complainant's heir at law, had authority to confirm the report, after complainant's death, by a conditional order in 1910 and to enroll the decree. *Powell* v. *Pierce*, 427.

4. The court had power under 1 Comp. Laws, § 557, to enroll the decree *nunc pro tunc*. *Id.*

5. Where complainant's bill to vacate certain proceedings in probate court for fraud was amended, and defendant filed a plea alleging that the issues were tried and determined in probate court, and that complainants had notice and appeared by counsel, the bill was properly dismissed at the argument of the legal questions presented by the plea, on which complainants did not take issue. *Davis* v. *McCamman*, 587.

6. Unless a defendant, who demurs to a bill of complaint, presents the points raised to the court by argument or objection, the demurrer is waived by going to a hearing on the merits. *Van Gallow* v. *Brandt*, 642.

See ABATEMENT AND REVIVAL; CONSTITUTIONAL LAW (8); CREDITOR'S SUIT; DEEDS; EXECUTION; INJUNCTION (1); LANDLORD AND TENANT (3, 4); PARTNERSHIP ASSOCIATIONS (4); PROBATE COURT.

EQUITY PRACTICE—See ABATEMENT AND REVIVAL (1); VENUE (1).

ESTATES—See WILLS (4–6).

ESTATES BY ENTIRETIES—See DIVORCE.

ESTATES OF DECEDENTS—See ATTORNEY AND CLIENT (4); EVIDENCE (15).

ESTOPPEL.

1. On the trial of an action for personal injuries, plaintiff's counsel admitted in open court that a turntable, at which plaintiff was employed turning an engine, could be revolved freely in either direction. The appellate court on error held that if he could have turned the table in the opposite direction the danger complained of could not have caused his injury and he should have selected the safer method. *Held*, that plaintiff was estopped on the second trial from taking the inconsistent position that the turntable could be revolved only in

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ESTOPPEL—Continued.

the direction in which he and his fellow-servants were causing it to move. *Connor* v. *Lake Shore, etc., R. Co.*, 29.

2. Judicial admissions stand upon a different footing from testimony and are conclusive, even upon a new trial. *Id.*

3. Where a contractor, pending negotiations with a mining company as to the sinking of a shaft for the purpose of mining rock salt, proceeded under an oral agreement with certain of the directors to do preliminary work, for which they were to be liable, but the corporation thereafter passed a resolution accepting the contractor's bid, and continued for several months to make advancements to the contractor, who continued to sink the shaft until the corporation had incurred an indebtedness of upwards of $7,000, and where he at no time advised the directors of his intention to hold them personally, or advised them of the progress of the work, but did acts inconsistent with such a theory, he is estopped to claim a personal liability. *Detroit Sav. Bank* v. *Loveland*, 168.

4. Estoppel is a bar which precludes a person from denying the truth of a fact which has in contemplation of law become settled by the act of the party himself. *Id.*

5. As to creditors of plaintiff with whom a compromise of his debts was effected, and from whom he concealed the fact that he intended to bring an action against certain of them for participating in the alleged wrongful conversion of the insurance funds, plaintiff was estopped from making the claim that they were liable to him, since they were entitled to full information concerning his assets, including such claim. *Dillon* v. *Craig*, 216.

See INSURANCE (2, 8, 13); LANDLORD AND TENANT (4); PARTNERSHIP ASSOCIATIONS (3); PRINCIPAL AND AGENT (2); SALES (1); VENDOR AND PURCHASER.

EVIDENCE.

1. Too high a degree of proof is required of a plaintiff by instructions to the jury that plaintiff had the burden of proof, and must establish the issue by a preponderance of the evidence clear and well defined, and must prove to the satisfaction of the jury the claim made. *J. H. Worden Lumber & Shingle Co.* v. *Minneapolis, etc., R. Co.*, 74.

2. It was not error to admit in evidence books of defendant, kept in the usual course of defendant's business, showing that the grates, ash pan, dampers, and netting of its locomotive which plaintiff claimed set a fire, were inspected and found in proper condition on the day after the fire. *Id.*

3. Weather reports from stations on either side of the fire, but at considerable distances therefrom, should not have been admitted in evidence without supporting testimony to show that they tended to indicate the direction of the wind at the place of the fire. *Id.*

4. It was reversible error to admit the mortality tables in evi-

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EVIDENCE—Continued.

dence, in an action under the survival act for the wrongful death of an infant 27 months old, whose expectancy did not appear from the tables: and the evidence was not admissible to show the probable duration of his life after he should arrive at majority. *Morse* v. *Detroit, etc., R. Co.*, 99.

5. A writing or memorandum used to refresh the recollection of a witness is not thereafter admissible as further substantive evidence of the fact: but when the witness has no recollection of the matters shown by the memorandum it is competent evidence if properly proved. *Koehler* v. *Abey*, 113.

6. Whether the truth of the memorandum was sufficiently guaranteed by the witness, who gave evidence tending to show that he may not have performed the duty which the memorandum evidenced, was a question for the court, and was correctly determined by rejecting the memorandum. *Id.*

7. In an action for personal injuries, alleged to have been caused by defendant's failure to guard the knives of a jointer, as required by an order of one of the State factory inspectors, who kept a memorandum of the order, but was unable to prove the truth thereof sufficiently to admit it in evidence, the court erred in rejecting evidence of the routine duties, and the custom of the witness to keep memoranda of his orders, and as to his habit of making false or correct entries. *Id.* 114.

8. The court erred in excluding from the evidence a report of the State commissioner of labor, required to be made by the provisions of statute, showing that the witness left an order at defendant's factory to guard the machine; but the report was not competent evidence that such order was, in fact, made, it was evidence only that the memorandum was authentic, and was made in the discharge of the inspector's official duty. *Id.*

9. Statements made by defendant's chauffeur, while he was disobeying defendant's instructions, and was not engaged in the business of his employer, were hearsay and inadmissible. *Riley* v. *Roach*, 294.

10. The mere fact that a respondent under arrest and in jail made a statement of the alleged facts concerning the crime to the prosecutor in the presence of an interpreter does not give rise to a presumption that his statement was involuntary. *People* v. *Sartori*, 309.

11. The permitting of leading questions is very largely discretionary with the trial judge. *Id.*

12. Testimony relating to the physical condition of one of the principal witnesses for the prosecution, and to her alleged paralyzed condition, was not improperly received. *Id.*

13. Nor was it improper to reject testimony of a witness that a third person had admitted that he committed the murder: evidence of such conversation was hearsay, as would also be a statement that another killed decedent. *Id.*

14. It was competent, in an action by a lineman for injuries

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EVIDENCE—Continued.

caused by defective insulation, to show that a guy wire, of which plaintiff took hold, became charged on two previous occasions; that the defendant was notified of the situation and made repairs which were insufficient to obviate the alleged imperfect insulation. *Huber* v. *Twin City General Electric Co.*, 531.

15. Testimony of a physician as to conditions discovered by him in an autopsy held against the consent of the patient's husband after he had acted as the attending physician of decedent in her lifetime, and had obtained privileged information, as a result of which situation he was enabled to make the examination after death, was improperly received over the objection of attorney for the husband, as administrator, in a personal injury action. *Thomas* v. *Township of Byron*, 593.

16. Admissions of the administrator concerning the result of such autopsy and the cause of his wife's death, being hearsay, since he could not bind the estate, and because he could not be impeached on immaterial and collateral matters, were improperly admitted in evidence. *Id.*

17. Since parol evidence tending to contradict the terms of a written instrument is incompetent, defendant was erroneously permitted to show, in a suit by a broker for commissions in effecting exchange of real estate, that a contract in writing between defendant and a purchaser secured by the broker, was not a final agreement. *Crane* v. *Ross*, 623.

18. An offer of defendant to pay plaintiff a certain amount in settlement of the brokerage commissions was incorrectly admitted and constituted prejudicial error when it appeared that a verdict for the exact amount of the offer was rendered without other evidence to sustain it. *Id.*

19. Testimony that defendant's property was covered by a heavy mortgage indebtedness, accompanied by reference on the part of his attorney to the fact for the purpose of arousing sympathy of the jury, was prejudicial. *Id.*

20. Parol evidence is incompetent to vary or contradict the plain terms of a valid will. *Van Gallow* v. *Brandt*, 642.

21. But the court may, in interpreting the language and construing the will in case the provisions are contradictory, or the terms ambiguous, consider the circumstances surrounding the testator when he made the will, and to that end may hear oral evidence as to the amount and nature of his property, his personal characteristics, his relations with and disposition towards those designated as objects of his bounty, and similar evidence as to his situation. *Id.*

See ARREST; ATTORNEY AND CLIENT (4); CHATTEL MORTGAGES; CONTRACTS (13); CRIMINAL LAW (7); CUSTOMS AND USAGES; ESTOPPEL (2); FRAUD (2, 8, 6); INTOXICATING LIQUORS (10); LIBEL AND SLANDER (4, 10); MASTER AND SERVANT (2, 8, 16); MUNICIPAL CORPORATIONS (2, 8); NEW TRIAL (2); PRINCIPAL AND AGENT (2, 8); TRIAL (5); TRUSTS (4); WILLS (2, 5); WITNESSES.

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EVIDENCE OF SIMILAR ACTS—See HOMICIDE (1)

EVIDENCE OF SPECIFIC DEFECT—See MASTER AND SERVANT (28).

EXAMINATION—See CRIMINAL LAW (5).

EXCEPTIONS—See APPEAL AND ERROR (6, 11); TRIAL (6).

EXCEPTIONS BEFORE SENTENCE—See CRIMINAL LAW (1).

EXCEPTIONS, BILL OF—See APPEAL AND ERROR (9).

EXCESSIVE SPEED—See STREET RAILWAYS (5).

EXCESSIVE VERDICT—See CARRIERS (2); LIBEL AND SLANDER (3, 6); MASTER AND SERVANT (33).

EXCHANGE OF PROPERTY—See EVIDENCE (17).

EXECUTION.

On motion to recall execution issued upon a judgment entered after an award in arbitration proceedings, which the defeated party had attempted to set aside in equity by bill for an injunction and other relief, it was not an abuse of discretion to refuse to recall the process; the causes may be permitted to proceed collaterally, although the proceedings at law may be set aside by decree in the chancery case. *Early* v. *Ingham Circuit Judge*, 451.

See CREDITOR'S SUIT.

EXECUTION OF CONTRACT—See AMENDMENTS; CONTRACTS (15); PARTNERSHIP ASSOCIATIONS (2); VENDOR AND PURCHASER (1).

EXECUTION OF WILL—See WILLS (2, 3).

EXECUTORS AND ADMINISTRATORS—See ATTORNEY AND CLIENT (4); EVIDENCE (16); FRAUD (4).

EXPECTANCY—See EVIDENCE (4).

EXPERT TESTIMONY—See MASTER AND SERVANT (8, 26).

EXPOSING BUILDINGS—See INSURANCE (5).

EXPRESS WARRANTY—See SALES (11, 12).

EXTENSION OF TIME—See PROCESS (2).

EXTRAS—See CONTRACTS (1, 4).

FACTORY INSPECTORS—See MASTER AND SERVANT (23).

FALSE REPRESENTATIONS—See FRAUD.

FEE SIMPLE—See WILLS (4)

FELLOW-SERVANT—See ESTOPPEL (1); MASTER AND SERVANT (13, 22).

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FIDUCIARY RELATION—See ATTORNEY AND CLIENT (6).

FINDINGS OF FACT—See APPEAL AND ERROR (3, 5).

FIRE INSURANCE—See INSURANCE.

FIRES—See EVIDENCE (2, 3); TRIAL (2).

FORECLOSURE—See EQUITY (3); MORTGAGES (2, 3, 5); PROCESS (3); VENDOR AND PURCHASER (3).

FOREIGN CORPORATIONS—See PROCESS (1).

FOREIGNERS—See TRIAL (4).

FORFEITURES—See INSURANCE (7); INTOXICATING LIQUORS (3, 4).

FRAUD.

1. Upon plaintiff's opening statement showing that the action was brought for false representations of defendants in a real estate deal wherein defendants, acting as brokers, induced plaintiff to pay $80,000 for certain apartments by stating to plaintiff that this was the lowest sum at which the owners would sell, although the owners' price was $24,000, the brokers receiving all they could secure above that amount, and although plaintiff claimed to have paid defendants $200 to secure for him the lowest price, the court erred in directing a verdict for defendants without receiving proofs; the question of fraud was for the jury. *Strachan* v. *Meyering*, 253.

2. Where complainant purchased of defendant stock in a corporation of which complainant later, in pursuance of the design with which he bought the stock, became manager, in defendant's stead, in a suit in equity to enjoin the foreclosure of the stock pledged to defendant to secure a part of the purchase price, the complainant was not entitled to relief upon a record showing that he did not place reliance on the representations of defendant as to the amount of assets, liabilities, and as to the financial condition of the corporation, but acted upon a full investigation and information obtained by other means. *Brooks* v. *Culver*, 436.

3. The burden of proof being on complainant to show fraud by clear and conclusive testimony, complainant was not entitled to damages for deceit which he endeavored to establish by his own unsupported testimony, denied by defendant. *Id.* 437.

4. A right to complain of fraudulent conduct of an administrator in filing accounts, and in his conduct in the matters of the estate, is not assignable. *Davis* v *McCamman*, 587.

5. Evidence that the vendor told plaintiffs, who were inexperienced in handling motor trucks, that the cars had passed the experimental stage, that they were the best made and would do good work, and that the representations were false and induced plaintiffs to enter into the contract, tended to establish more than trade talk and warranted the submission to the jury of the question of fraud. *Hall* v. *Duplex-Power Car Co.*, 634.

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FRAUD—Continued.

6. All evidence, tending to prove that the trucks were not practicable and saleable as commercial machines, was competent evidence upon that issue. *Id.*

See ASSUMPSIT (1, 2); ATTORNEY AND CLIENT (4); CONTRACTS (9); DEEDS; EQUITY (5); TROVER AND CONVERSION.

FRAUDS, STATUTE OF—See LANDLORD AND TENANT (4).

FRAUDULENT CONVEYANCES—See CREDITOR'S SUITS (2).

GEARING—See MASTER AND SERVANT (24, 25).

GOOD FAITH — See LIBEL AND SLANDER (5); MUNICIPAL CORPORATIONS (8).

GREAT LAKES—See BOUNDARIES (1).

GUARANTY—See SALES (13).

GUARDIAN AND WARD—See EQUITY (2); INTERPLEADER (3).

HABEAS CORPUS—See ABANDONMENT.

HABITUAL DRUNKARD—See INTOXICATING LIQUORS (9).

HEARING—See EQUITY (6).

HEARSAY—See EVIDENCE (9, 13, 16).

HIGHWAYS AND STREETS.

Whether plaintiff was guilty of contributory negligence in attempting to return home from market in the evening along a road which was dangerously narrow and slippery with recent rains, as he knew, where his wagon slid into the ditch, injuring his horse, was a question for the jury. *Highland* v. *Township of Garfield*, 588.

See AUTOMOBILES (1); INJUNCTION; STREET RAILWAYS (2, 5–7).

HOLOGRAPHIC WILL—See WILLS (1).

HOME RULE ACT — See CONSTITUTIONAL LAW (8); MUNICIPAL CORPORATIONS (4).

HOMICIDE.

1. In a prosecution for murder, evidence showing that the son of the deceased victim was killed at the same time by having his throat cut was admissible. *People* v. *Sartori*, 308.

2. Whether or not the evidence was material, the admission of testimony concerning an arrangement for a meeting between the deceased and one who was jointly accused with respondent was not prejudicial error. *Id.*

See CRIMINAL LAW (2, 3); EVIDENCE (13).

HOSTILE WITNESS—See WITNESSES.

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HUSBAND AND WIFE—See ABANDONMENT; BROKERS; DIVORCE; INTOXICATING LIQUORS (10); SALES (10).

Liability of husband for rental of clothing by wife, see SALES (8).

ILLEGAL CONTRACT—See CONTRACTS (9).

IMPEACHMENT—See EVIDENCE (16).

IMPLIED AGENCY—See PRINCIPAL AND AGENT (2).

IMPLIED CONTRACT—See CONTRACTS (6, 8, 11, 12); SALES (9).

IMPLIED MALICE—See LIBEL AND SLANDER (13).

IMPLIED WARRANTY—See SALES (11).

IMPROVEMENTS—See EJECTMENT (3).

IMPUTED KNOWLEDGE—See VENDOR AND PURCHASER (2).

IMPUTED NEGLIGENCE—See CARRIERS (11).

INCOMPETENT ENGINEER—See MASTER AND SERVANT (22).

INCUMBRANCE—See INSURANCE (1, 2).

INFANTS—See APPEAL AND ERROR (12); CARRIERS (7, 10); EVIDENCE (4); MASTER AND SERVANT (23-25, 34); RAILROADS (2).

INJUNCTION.

1. In a suit by a railroad corporation to restrain defendant from interfering with complainant's occupancy of a street legally vacated by the city, and the construction of a depot on the property, the court was warranted in finding, on a cross-bill by defendant, that the inconvenience suffered by defendant was insufficient to authorize the court in restraining a necessary improvement beneficial to the public. *Detroit & Mackinac R. Co.* v. *Sioux City Seed & Nursery Co*, 668.

2. If defendant suffered pecuniary damage by virtue of the closing of the street and rendering access to defendant's premises difficult or circuitous, it has a remedy at law for the damages which are readily ascertainable. *Id.*

3. 2 Comp. Laws, § 6284, par. 5, requiring railroad corporations before constructing their railways on streets, etc., to pay compensation to adjacent owners that are injured, does not have application to the erection of a station. *Id.*

4. Defendant was not entitled to an order for an injunction to be issued in six months unless the railway company should institute proceedings to condemn defendant's rights, as such course would preserve to defendant no rights which it could not protect in an action against complainant. *Id.*

See FRAUD (2); INTOXICATING LIQUORS (11); LANDLORD AND TENANT (3, 4); MANDAMUS; VENUE (1).

INSPECTION—See EVIDENCE (2); MASTER AND SERVANT (26, 27), PLEADING (5); SALES (2, 3).

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INSTRUCTIONS—See APPEAL AND ERROR (2, 10, 13); CONTRACTS (15); LIBEL AND SLANDER (7, 11); MASTER AND SERVANT (13); STREET RAILWAYS (4).

INSURANCE.

1. Notice to a solicitor of fire insurance, who induced insured to take out a policy, that a chattel mortgage existed on the property, was not notice to defendant company, which was not shown to have employed the solicitor and had only one agent, by whom the solicitor was employed, in the county where the policy was written. *Moloney* v. *Germania Fire Ins. Co.*, 269.

2. Where defendant's insurance adjuster, at the time he made out proofs of loss, was informed of the existence of an incumbrance on the insured property, and the insurer did not learn of the fact until later, and no assurance was given or act done on which the insured relied to his prejudice, a delay of about sixty days in notifying him that the company refused to pay was not a waiver of the defense, nor did the delay estop defendant from urging it. *Id.*

3. *Held*, that no sufficient evidence of any compromise made by the insurance adjuster appeared. *Id.*

4. In a policy of insurance covering a gasoline launch, permission to store the boat "outside," when construed with the remainder of the policy and with the application, signified that the boat might be stored out from the shore in the waters of the adjacent bay. *Macatawa Transportation Co.* v. *Fireman's Fund Ins. Co.*, 365.

5. Under the terms of the policy providing that the distance to exposing buildings should be 500 feet, only such buildings as increased the danger because of the use of fire were intended. *Id.*

6. Notwithstanding 2 Comp. Laws, § 5180, providing that no policy of fire insurance shall hereafter be declared void for the breach of any condition if the insurer has not been injured by such breach or the loss has not occurred by reason thereof, the policy became void for breach of a promissory warranty that the distance to exposing buildings should be 500 feet. *Id.*

7. Where plaintiff, a member of a mutual fire insurance association, organized to insure members of a grange order in good standing, withdrew from the local grange and ceased paying dues, forfeiture of the policy of insurance according to the strict terms thereof was waived by the insurer which took no action to cancel the policy and continued to receive assessments upon the policy after notice to its secretary of the status of insured. *Laxton* v. *Patrons' Mut. Fire Ins. Co.*, 448.

8. Under provisions of the charter of a mutual fire insurance corporation, permitting insured to assign his policy only upon the written consent of the secretary indorsed thereon, and terminating the insurance upon sale or transfer of property insured, the purchaser of insured premises, who gave no notice to the insurer, and did not obtain the written consent

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INSURANCE—Continued.

of its secretary to the assignment, could not recover on the ground that defendant's collector, one of its directors, knew of the sale and assignment, and received payments from the agent of plaintiff, the assignee. *Xamm & Schellinger Brewing Co.* v. *St. Joseph County Village Fire Ins. Co.*, 606.

9. There being no privity or mutuality of contract between plaintiff and defendant so as to render plaintiff liable to the other members of the mutual company for plaintiff's proportion of their losses, plaintiff, as assignee of such policy, obtained no rights as against the insuring corporation. *Id.*

10. Agents and officers of mutual fire insurance companies, in which the charter and by-laws determine the rights of members, have less authority than those of stock companies in creating a waiver of conditions contained in contracts: officers have no power to bind their companies by other inconsistent contracts or provisions. *Id.*

11. The principle which lies at the foundation of mutual insurance, and gives it the name, is mutuality; in other words the intervention of each person insured in the management of the affairs of the company and in the profits and losses of the business in proportion to his interest. *Id.*

12. In order to apprise the insurer of material changes in the risk, provisions requiring notice of transfers, change of title, etc., are reasonable and enforceable. *Id.*

13. And where, after a transfer of insured premises, the assignee of the policy, knowing that assessments were made to the assignor, paid such assessments without securing the required consent of defendant to the assignment, such transferee could not recover, although the collector who received the payment was a director of defendant and had knowledge of the change in title. *Id.* 607

INSURANCE FUNDS—See TROVER AND CONVERSION.

INTENT—See MUNICIPAL CORPORATIONS (3).

INTERCHANGE OF CARS—See CONSTITUTIONAL LAW (1).

INTERPLEADER.

1. A bill of interpleader is a bill filed for the protection of a person from whom several persons claim, legally or equitably, the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. *Detroit Trust Co.* v. *Hunrath*, 180.

2. A landlord, who leased premises and subsequently made a second lease, subject to the first, providing that the subsequent lessee should have possession on default of the first, may not maintain a bill of interpleader against the tenants because the subsequent lessee claims that the prior tenant has violated the terms of his lease by subletting without stipulated written consent of the landlord. *Id.*

3. The guardian of one of the landlord's heirs has no greater right to file such bill than had the ancestor. *Id.*

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INTERSTATE COMMERCE—See CONSTITUTIONAL LAW (1).

INTOXICATING LIQUORS.

1. The Warner-Cramton law (Act No. 291, Pub. Acts 1909), introduced into the liquor laws a new element establishing other requirements than the mere payment of a tax as a prerequisite to engaging in the business, and is therefore subject to the rules pertaining to a license law, as distinguished from a tax law. *People* v. *Schafran*, 324.

2. Since it is not within the power of the legislature to make an irrepealable contract as to matters that affect the public health or morals so as to limit the exercise of the police power, the licensee has no vested property right in his license, which may be granted on such conditions as the State sees proper to impose. *Id.*

3. It was within the constitutional power of the legislature to provide that a retail liquor dealer's license should be forfeited if he should be twice convicted of violating the provisions of the liquor law; and the condition is not so unreasonable or oppressive as to be invalid. *Id.*

4. The effect of two convictions is to forfeit the right of the licensee without further proceedings to revoke his rights. *Id.*

5. The license is a mere privilege granted under the police power to carry on the business subject to the will of the grantor, and is not a contract or property interest protected by the Constitution. *Id.*

6. No repayment of the license fee or any part thereof is contemplated by the statute as a limitation precedent to prosecution for selling without a license. *Id.*

7. Nor, in the absence of statutory provision therefor, is the liquor dealer entitled to a rebate for the unexpired term. *Id.*

8. Evidence that the respondent in a criminal action took out a retail liquor dealer's license to engage in business at a certain place, and while the building was undergoing repairs or alterations he entered the employ of another retail dealer as manager of the business, which was conducted at a separate location, under a license issued to the owner, is insufficient to sustain a prosecution upon a charge of selling and keeping for sale intoxicating liquors, in violation of Act No. 291, Pub. Acts 1909. *Weimer* v. *Kalamazoo Circuit Judge*, 498.

9. Under undisputed evidence that defendant sold plaintiff's husband, an habitual drunkard, intoxicating liquors, after having been notified not to do so, that plaintiff was injured in the matter of her support, suffered personal violence at his hands, that her property was destroyed and she suffered in her feelings, a verdict of six cents damages was against the weight of the evidence and should have been set aside on motion for a new trial. *Fleming* v. *Gemein*, 541.

10. The court erred in refusing to admit testimony of the wife as to her husband's conduct while he was intoxicated from liquor sold by defendant: the evidence was not of a privileged character. *Id.* 542.

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INTOXICATING LIQUORS—Continued.

11. In a village of 830 inhabitants having more than one saloon to 500 inhabitants, as limited by the Warner-Cramton law (Act No. 291, Pub. Acts 1909), three saloon keepers being engaged in business at the time said law took effect and holding over, where relator's application, filed before April 15th, was first considered and granted by the village council, the action of such council was a proper exercise of preference; as it was not intended by the statute to prefer those already engaged in business. *Rohde* v. *Wayne Circuit Judge*, 683.

12. The fact that the council unlawfully granted licenses to four applicants, including relator and the three other liquor dealers, should not deprive relator of his remedy. *Id.*

13. That relator intended to conduct a saloon in a residence district without having obtained the consent of all property owners within 300 feet, under section 37 of the act, is not a sufficient ground of objection, where the proposed location had been previously occupied for the same purpose. *Id.*

14. Mandamus does not lie to compel a township board to grant an application for a retail liquor license, in a township of 1,249 inhabitants which had six saloons in April, 1909, and four at the time of relator's application, two licensees having failed to apply for a renewal; since Act No. 291, Pub. Acts 1909, was intended to reduce the number of saloons to a ratio of one for each 500 inhabitants, and the term "voluntary surrender" used in the law includes failure to renew licenses which have expired. *Ploof* v. *Bangor Township Board*, 697.

15. Where it appeared, on a motion for rehearing, that the applicant for the license was a new applicant, but the license applied for had been issued to a liquor dealer during the preceding year, who had failed to apply for a renewal, the license was properly refused to relator. *Id.*

See LANDLORD AND TENANT (1, 3, 5); NEW TRIAL; STATUTES.

INTOXICATION AS AFFECTING CONVEYANCE—See DEEDS

INVENTORY—See JUSTICES OF THE PEACE.

JOINDER OF COUNTS—See PLEADING (4).

JOINT DEFENDANTS—See BROKERS.

JUDGMENT — See ABATEMENT AND REVIVAL; JUSTICES OF THE PEACE; NEW TRIAL (1).

JUDICIAL ADMISSIONS—See ESTOPPEL (1, 2).

JURISDICTION — See ABANDONMENT; CORPORATIONS (2); CREDITOR'S SUIT; DIVORCE (1); EQUITY (1); INJUNCTION (2); PROBATE COURT; PROCESS (1, 3); VENUE (1, 3).

JURY—See CRIMINAL LAW (2, 3); NEW TRIAL (2).

JUSTICES OF THE PEACE.

Judgment in justice's court against a defendant in attachment served with the summons but not with the writ of attach-

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JUSTICES OF THE PEACE—Continued.

ment or a copy of the inventory is invalid. 1 Comp. Laws, § 780. *Rameau* v. *Valley*, 569.

See AMENDMENTS; PLEADING (6); QUO WARRANTO.

JUSTIFICATION—See LIBEL AND SLANDER (1, 10).

LABOR COMMISSIONER—See EVIDENCE (8).

LACHES—See EQUITY (3); MORTGAGES (5).

LAND CONTRACT—See PARTNERSHIP ASSOCIATIONS (2, 3); VENDOR AND PURCHASER.

LANDLORD AND TENANT.

1. By granting permission in writing to a tenant, "but not to his heirs, assigns, executors, administrators or any other person," to conduct a bar in connection with a hotel which he was operating on premises leased subject to a restriction against selling intoxicating liquors, the landlord did not waive his right to enforce the restrictive clause against assignees of the hotelkeeper's interest. *Hammond* v. *Hibbler*, 66.

2. A restriction contained in a lease for a term of years should receive more favorable consideration than a restriction in a deed. *Id.*

3. Having an adequate remedy at law, a brewing company which leased premises to a saloon keeper on condition that he should not purchase beer from any other party, is not entitled to an injunction against the saloon keeper to restrain him from buying beer from other manufacturers as the exigencies of his trade required, when it appeared that the tenant sold the lessor's beer as his principal commodity, and secured permission orally from defendant to sell the beer of other wholesale dealers as it might be called for, and that the amount of other beer so purchased was small and the probable damages inconsiderable. *Voigt Brewing Co.* v. *Holtz*, 352.

4. A waiver, invalid because not in writing, of conditions contained in a lease for a term of years, may be treated as an equitable estoppel to enjoin a breach of the written instrument. *Id.*

5. Upon the adoption of prohibition under the local-option law, a lease of premises to be occupied for and by a saloon did not become void, in the absence of a warranty in the contract that the use of the premises for that purpose should be continuous throughout the term. *Hyatt* v. *Grand Rapids Brewing Co.*, 360.

6. Where the lessor of a building consented during the first part of the term to the tenants' subletting a portion of the premises in pursuance of a condition requiring his consent contained in the lease, which was for three years with the privilege of two more years at the lessee's option, the permit as to subleasing extended over the entire term of five years, upon the tenants' exercising their privilege. *Flynn* v. *Bachner*, 424.

See EQUITY (1, 2); INTERPLEADER (2, 3).

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LEADING QUESTIONS—See EVIDENCE (11).

LEASES—See INTERPLEADER (2); LANDLORD AND TENANT; SALES (8).

LIBEL AND SLANDER.

1 In an action for libel, defendant, a newspaper, was not privileged on the ground that it made inquiry before publishing the objectionable article in which plaintiff was charged with murder and marital infidelity; it appearing that inquiry was made of the local police officials who knew nothing about the facts. *Clair* v. *Battle Creek Journal Co.*, 467.

2. The article was actionable *per se*. *Id.*

3. The court, on appeal, will not set aside a verdict on the ground that it was excessive unless satisfied that the result was reached as a consequence of gross error, passion, bias, or corruption. *Id.* 468.

4. General damages for injury to plaintiff's reputation, feelings, etc., are allowable without proof of special injury from words libelous *per se*, and as bearing on the amount the recklessness or care of defendant in publishing the statements complained of was a proper subject of consideration by the jury. *Id*

5. Defendant's alleged good faith did not affect plaintiff's right to compensation for injury to feelings and reputation. *Id.*

6. And a verdict of $1,500 was not so excessive as to require the granting of a new trial. *Id.*

7. In libel for publication of language imputing to plaintiff the embezzlement of county funds, it was error to charge the jury that defendant, a county supervisor, was not privileged if the jury could find he imputed to plaintiff a crime, where the objectionable charge was contained in a report made to the public by a letter prepared by defendant as chairman of an investigating committee duly appointed to investigate the accounts of the county treasurer *Madill* v. *Currie*, 546.

8. It is the occasion that determines the question of privilege, not the language employed. *Id.*

9. And a report of such chairman upon a matter of public concern, under circumstances showing that the public were interested in knowing the true state of facts, was qualifiedly privileged. *Id.*

10. Defendant was not required to show that plaintiff was in fact guilty, by testimony sufficient to prove it beyond a reasonable doubt; a mere preponderance would suffice. *Id.* 547.

11. When conflicting instructions are given, one of which is erroneous, it is presumed that the jury may have followed that which was erroneous. *Id.*

12. That defendant published his report in a newspaper instead of filing it with the county clerk, does not destroy the qualified privilege. *Id.*

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LIBEL AND SLANDER—Continued.

18. Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained without proof of express malice. *Id.*

LIBRARIES—See SCHOOLS AND SCHOOL DISTRICTS (1).

LICENSES—See INTOXICATING LIQUORS (1–8, 11–15).

LIENS—See ATTORNEY AND CLIENT (8); DIVORCE (4); MORTGAGES (4)

LIMITATION OF INDEBTEDNESS—See CONSTITUTIONAL LAW (8); MUNICIPAL CORPORATIONS (7).

LIMITED LIABILITY—See PARTNERSHIP ASSOCIATIONS (1)

LOCAL LEGISLATION—See CONSTITUTIONAL LAW (4, 8).

LOCAL SELF-GOVERNMENT—See CONSTITUTIONAL LAW (4); SCHOOLS AND SCHOOL DISTRICTS (3).

LOCATION OF SALOON—See INTOXICATING LIQUORS (13).

LOCOMOTIVE AS TRAIN—See MASTER AND SERVANT (3).

LOGGING ROADS—See RAILROADS (3).

LOOKOUTS—See CARRIERS (12).

LOST WRITTEN INSTRUMENT—See TRUSTS (4, 5).

MALICE—See LIBEL AND SLANDER (1, 13); PRINCIPAL AND AGENT (1).

MANDAMUS.

Although the Supreme Court does not review by mandamus, in ordinary cases, the issuance of a preliminary writ of injunction granted upon the hearing of an order to show cause, it will take cognizance of a case which involves merely a question of law. *Titus* v. *Chippewa Circuit Judge*, 507.

See APPEAL AND ERROR (9); CONSTITUTIONAL LAW (3); EXECUTION; INTOXICATING LIQUORS (8, 12, 14).

MARINE INSURANCE—See INSURANCE (4–6).

MASTER AND SERVANT.

1. It was not negligence on the part of a train dispatcher to direct a regular train to proceed, after having informed a subordinate in charge of the local yard and the movement of trains, that the regular passenger train would not run over that portion of the line but would detour, where the train dispatcher had the right to expect, if any other train was permitted to proceed on the time of the passenger train, its crew would obey all rules and requirements of the com-

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MASTER AND SERVANT—Continued.

pany, which, if followed, would protect both trains. *Jones* v. *Pere Marquette R. Co.*, 1.

2. The meaning of printed or written rules and bulletins of a railroad corporation for the guidance of its employés is for the court unless some ambiguity is involved, and opinion evidence is not admissible to show their meaning *Id.*

3. Under provisions of defendant's rules that the word train should be understood to apply to an engine or more than one engine coupled, with or without cars, etc., a freight engine and its tender were included in a rule forbidding north bound trains to use the south-bound track of a double-track system. *Id.*

4. A rule forbidding north-bound trains to use the south-bound track was not shown to have been changed by a custom to use the track inconsistently with such rule under evidence that yard engines used both tracks in either direction, under the direction of a yardmaster, but not on the time of regular trains, and under special precautions for protecting them, or that a dummy train was permitted by authority to use the south-bound track in running north, or that passenger and freight engines took the left track to go to the roundhouse; defendant employing a man to see the rules were obeyed, so far as possible, and keeping the rules and bulletins posted in conspicuous places. *Id.*

5. It is only where the defendant has sanctioned a custom to violate its rules that they will be deemed abrogated. *Id.* 2.

6. Plaintiff was guilty of contributory negligence in using the south-bound track to go north with his locomotive. *Id.*

7. Whether defendant, a railroad company, was negligent in failing to cause a train order to be delivered notifying the crew of a construction and repair train of a washout on its right of way, on the theory that the train dispatcher sent an ordinary message to the operator at Corunna, without requiring the customary evidence of its delivery, as in case of a train order, and such was not a proper method of communicating the information, was rightly submitted to the jury. *Graham* v *Detroit, etc., R. Co.*, 41.

8. The opinion of a train dispatcher that the method adopted was a proper method was correctly excluded from the evidence *Id.*

9. A corporation conducting a store, of which it employed a manager and clerk, is not liable for injuries caused by its clerk, whose only duties were to wait upon customers and take care of the stock, in assaulting and striking plaintiff with a hammer, where plaintiff's testimony indicated that the assault was unprovoked and unwarranted, defendant's testimony showing that plaintiff used improper and obscene language in the presence of women, and the clerk after ordering plaintiff out of the store attacked him. *Ducre* v. *Sparrow-Kroll Lumber Co.*, 49.

10. Where a safety device, used to hold the lever which operated

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MASTER AND SERVANT—Continued.

a saw carriage, had been employed for six years without accident, and plaintiff's decedent was injured because the clamp in some conjectural manner became detached and permitted the carriage to start fatally injuring decedent, there was not sufficient evidence of negligence to submit the case to the jury. *Johnson* v. *Jackson*, 149.

11. It was a question of fact for the jury to determine whether or not an inexperienced employé who had not been warned of the danger of removing a sliver from between saws, and whose arm was jerked into the saw by a long sliver which he tried to remove, was guilty of negligence contributing to his injury. *Martin* v. *Jerry Madden Shingle Co.*, 175.

12. The question of the sufficiency of his employer's instruction and of the necessity of warning the servant, who had been told to watch another employed at similar work, and had observed him for half an hour before commencing to work, was also for the jury. *Id.*

13. Defendant having introduced evidence to show that plaintiff had received a warning from a servant of defendant not to remove splinters from the saw by hand, the court erred in charging the jury that he would be bound only by a warning from some person who was known by plaintiff to have had experience about gang saws. *Id.*

14. There was no evidence tending to show that a derailment of a freight car, which collided with a pile of lumber near defendant's switch, killing plaintiff's decedent, was the proximate result of the switch being built on made ground on low land near the river, in an action for negligent death under the survival act, wherein it merely appeared that the rails at the joint near the place of derailment settled about two inches when a car passed over them; but in any event decedent, who had known the condition of such ground for several years, assumed any risk arising from that mode of construction *Anderson* v *Michigan Cent. R. Co.*, 207.

15. Nor was there any evidence to warrant the trial court in submitting to the jury the questions whether the track was properly ballasted, or the joints thereof were upon a reasonably firm foundation. *Id.*

16 Any lack of evidence that defendant claimed appeared in plaintiff's case upon the issue of the existence, at the time of decedent's injury, of defects discovered by plaintiff's witnesses a week later, was supplied by defendant's showing that when the track was repaired, after the accident, no change was made in the track, that it was merely restored to its previous condition. *Id.*

17. It was for the jury to say whether or not it was negligent for defendant to construct the track of the switch from one-half to nine sixteenths of an inch narrower than the standard width upon the curve where decedent was killed. *Id.* 208.

18. Where lumber was piled at the usual and convenient distance from the switch and could not reasonably have been piled at

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MASTER AND SERVANT—Continued.

such a distance as to have prevented collision with a derailed car, no negligence could be predicated upon the location of the lumber pile. *Id.*

19. The question of plaintiff's contributory negligence, in riding on the side of the car at the forward end upon the outside of the curve so that he was invisible to the engineer or fireman, was for the jury. *Id.*

20. And it was for the jury to say whether the derailment occurred by reason of the car's running over a piece of scantling that was afterwards found beside the track and bore marks of a car wheel. *Id.*

21. For negligent injuries caused by defendant's chauffeur, who was directed by his employer not to take the automobile out while he was away from home unless directed by his wife, but who disobeyed instructions and took the car out with several guests that were staying at the house, defendant was not liable, under a declaration charging that the chauffeur acted with the knowledge and consent of defendant. *Riley* v. *Roach*, 294.

22. Evidence offered to show the incompetency of an engineer employed in defendant's coal mine examined, and *held*, to require the direction of a verdict for defendant. *Layzell* v. *J. H Somers Coal Co.*, 378

23. By the provisions of Act No. 285, Pub. Acts 1909, it was not intended by the legislature to constitute the factory inspector sole judge as to what employment is dangerous to the life and limb of a minor under eighteen years of age, hired and set at work prohibited by the act. *Tabinski* v. *A. Harvey's Sons Manfg. Co.*, 392.

24. Gearing, within the terms of such statute, includes cog wheels, whereby power is transmitted from one portion of a machine to another; exposed and unprotected gearing is within the meaning of the law requiring proper safeguards for all gearing and belting. *Id.*

25. Exposed gears were dangerous within the meaning of such act. *Id.*

26. In an action for personal injuries charged to have resulted from the fall of defendant's elevator that plaintiff claimed had previously given evidence of a defective and unsafe condition, the trial court erred in excluding answers to questions asked of plaintiff's expert witness, in support of the charge contained in his declaration as to defendant's failure to inspect the elevator, whether an inspection would have disclosed certain defects, how often the brakes and safety devices ought to be inspected, and how the inspection should be made. *Ammer* v *Postal*, 405.

27. Nor should the court have directed a verdict for defendant for the alleged reason that there was no sufficient evidence of any neglect, upon testimony having a tendency to show that the elevator had failed to stop some four weeks prior to the injury, that the safety catch had been jarred and was fas-

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MASTER AND SERVANT—Continued.

tened back, that the elevator twice dropped during the week before the accident, and also a few hours previously. *Id.* 406.

28. Plaintiff could not be required to show by direct testimony what was the specific defect that caused the improper working of the elevator. *Id.*

29. That defendant was contemplating an immediate alteration in its entire construction did not change its duty to employés. *Huber* v. *Twin City General Electric Co.*, 532.

30. An electric power company, engaged in producing currents of high voltage, is charged with the duty towards its employés of exercising a very high degree of care because of the extremely hazardous nature of the business. *Id.*

31. While a lineman was chargeable with the assumption of such risks as are incident to the business, and such as grow out of dangers that he knew, or in the exercise of due care should have known, he did not assume the risk of a danger as to which the employer had actual notice and neglected to warn the employé *Id*

32. Whether he should have anticipated that a guy wire not usually charged might conduct a charge of electricity from an adjacent high voltage wire was a question for the jury. *Id.*

33. A verdict of $2,500 for dislocation of an arm, resulting in weakness of the muscles and occasional pain nearly a year after plaintiff's injury, by which he was disabled from work for about 20 days, should not be set aside as excessive. *Id.*

34. And though plaintiff was young and inexperienced, and was unable to explain the nature and method of operation of the stamp press on which he was employed, his unsupported or contradicted testimony that a certain spring was loose, that the press repeated at different times when he did not trip the mechanism, that he advised his employer of the defect, and received from him a promise to repair the defect, and was injured while working in reliance on his master's promise before the press was repaired, presented a case for the jury. *Prisel* v *Coney*, 602.

35. Defendant, a railroad corporation, was not liable to plaintiff for an alleged assault made upon him by an employé of defendant who was also a police officer and who went to the assistance of a policeman that requested aid in arresting plaintiff for disorderly conduct and drunkenness *Buman* v. *Michigan Cent. R. Co.*, 651.

36. When a police officer arrests a disorderly person it is presumed that he is acting in his official capacity and not as agent for his employer *Id.*

See APPEAL AND ERROR (12); CONTRACTS (6, 7); ESTOPPEL (1); EVIDENCE (9, 14); PLEADING (5), PRINCIPAL AND AGENT (1); RAILROADS (3, 4); WITNESSES.

MATERIALITY OF EVIDENCE—See HOMICIDE (2); MUNICIPAL CORPORATIONS (2).

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MATERIALMEN—See MUNICIPAL CORPORATIONS (5).

MEMORANDA—See EVIDENCE (5, 6).

MICHIGAN RAILROAD COMMISSION — See CONSTITUTIONAL LAW (1–3).

MINES AND MINING—See MASTER AND SERVANT (22).

MINORS — See APPEAL AND ERROR (12); CARRIERS (7, 10); EVIDENCE (4); MASTER AND SERVANT (23–25, 34); RAILROADS (2).

MISCONDUCT OF ATTORNEY—See ATTORNEY AND CLIENT (6); TRIAL (2, 4, 5).

MISJOINDER OF COUNTS—See ASSUMPSIT (1, 3); PLEADING (1–4).

MITIGATION OF DAMAGES—See LIBEL AND SLANDER (5)

MORTALITY TABLES—See EVIDENCE (4)

MORTGAGES.

1. While notice of filing of a decree of foreclosure and of the steps taken to advertise and sell is required by the rules and practice of the court of chancery, a defendant who had actual notice in season of the sale and report of sale, and whose attorney attended the sale and filed exceptions to the commissioner's report, was not prejudiced by complainant's omission to give formal notice. *Union Trust Co.* v. *Electric Park Amusement Co.*, 574.

2. Where a decree of foreclosure as filed in the Supreme Court required payment to be made to reinstate defendant under the mortgage on or before January 5th, but was not signed and filed until January 7th, the defendant who was allowed the statutory right to redeem within six months after sale, which did not take place for two months, could not complain. *Id.*

3. Taxes paid by the complainant after decree and before sale were properly allowed to complainant, who bid in the premises for the amount due, including them. *Id.*

4. As mortgagee complainant would be entitled to an equitable lien for such amounts, and to reimbursement out of any surplus arising from the sale of the premises. *Id.*

5. A party relying on irregularities must complain promptly, or lose his right to relief. *Id*

See APPEAL AND ERROR (8); DIVORCE (4); EQUITY (3); PROCESS (3); TRUSTS (1).

MOTIONS—See APPEAL AND ERROR (9).

MOTOR VEHICLE LAW — See AUTOMOBILES; CONSTITUTIONAL LAW (6).

MULTIFARIOUSNESS—See APPEAL AND ERROR (8).

MULTIPLICITY OF SUITS—See EQUITY (1).

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MUNICIPAL CORPORATIONS.

1. Upon the failure or neglect of a contractor engaged in constructing a tunnel for a private corporation, to take sufficient precautions for the protection of municipal water mains, the board of water commissioners were justified in taking reasonable precautionary measures, and could recover the expense thereof in an action against the contractor. *Board of Water Com'rs of the City of Detroit* v. *Butler Bros. Construction Co.*, 137.

2. While it was immaterial to offer evidence of the breaking of a pipe which the contractor had paid for and was not involved in the action, the error was not prejudicial. *Id.* 138.

3. Testimony of a member of the water board that the expense was incurred to guard against loss of life and the danger of a conflagration was proper evidence tending to show good faith, and was not an opinion. *Id.*

4. Amendments to the charter of a city must be submitted to the vote of the electors at the next election after the proposed amendment has been adopted by the municipal council, whether the election is general or special. Act No. 279, Pub. Acts 1909; Act No. 208, Pub. Acts 1911. *Attorney General, ex rel. Vernor*, v. *Common Council of the City of Detroit*, 249.

5. Coal used for fuel to operate a dredge that a municipal contractor employed in digging a trench for an intake pipe of the municipal waterworks, was not covered by the statutory bond of the contractor "against all claims due from said contractor or other subcontractors under them, which may accrue to any person, firm, or corporation on account of any labor performed or materials furnished under and by virtue of this contract." *City of Alpena, for use of Gilchrist*, v. *Title Guaranty & Surety Co.*, 350.

6. Though municipal corporations, organized for the same purposes, with like powers and duties, cannot exist in the same territory, those having different purposes, rights, and duties may, and often do, occupy the same territory. *Attorney General, ex rel. Mc Rae*, v. *Thompson*, 511.

7. Construing the provisions of the Detroit charter limiting the municipal indebtedness, in connection with the evident purposes of the legislature, with the other provisions of the instrument and with reference to the title, which omits any reference to the educational system, the limitation applies only to the indebtedness for general municipal purposes. *Id.*

8. The application of particular provisions is not to be extended beyond the general scope of a statute unless such extension is manifestly designed. *Id.* 512.

9. Taxes and bonds for school and educational purposes are not for city and municipal purposes. *Id.*

See CONSTITUTIONAL LAW (4, 5, 8); CRIMINAL LAW (1); HIGHWAYS AND STREETS; INJUNCTION (1); INTOXICATING LIQUORS (11, 12, 14); SCHOOLS AND SCHOOL DISTRICTS (2–4); TAXATION.

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MURDER—See CRIMINAL LAW (2, 3); HOMICIDE.

MUTUAL FIRE INSURANCE COMPANIES—See INSURANCE (7-11).

MUTUALITY—See CONTRACTS (5); INSURANCE (9); PARTNERSHIP ASSOCIATIONS (2).

NAVIGABLE WATERS—See BOUNDARIES (1).

NECESSARIES—See SALES (8).

NEGLIGENCE—See AUTOMOBILES (1); CARRIERS (3-5, 7, 8, 11, 12); CONSTITUTIONAL LAW (6, 7); HIGHWAYS AND STREETS; LIBEL AND SLANDER (1); MASTER AND SERVANT; PLEADING (1, 5); RAILROADS; STREET RAILWAYS; TRUSTS (1).

NEW APPLICANT—See INTOXICATING LIQUORS (11, 15).

NEWSPAPERS—See LIBEL AND SLANDER (1, 12).

NEW TRIAL.

1. Where plaintiff was entitled to a verdict for some amount, by the great weight of the evidence, in a civil-damage action, the court exceeded its authority in denying a new trial in case defendant should pay the costs and an attorney's fee to plaintiff. *Stanton* v. *Foley*, 458.

2. The verdict being contrary to the clear weight of the evidence, plaintiff was entitled to have a jury pass on the amount of damages, even though the testimony as to the same was meager. *Id.*

See CRIMINAL LAW (5, 7); INTOXICATING LIQUORS (9); LIBEL AND SLANDER (3, 6).

NOMINAL DAMAGES—See INTOXICATING LIQUORS (9).

NONRESIDENTS—See CORPORATIONS; PROCESS (1); VENUE (1).

NOTICE—See BROKERS; EJECTMENT (2); EVIDENCE (14); INSURANCE (1, 2, 7, 8, 12, 13); MASTER AND SERVANT (1, 4, 5, 27, 31, 34); MORTGAGES (1); SALES (3, 7); VENDOR AND PURCHASER (1, 2).

NOTICE OF CHARGES—See ATTORNEY AND CLIENT (2).

NOTICE OF DEFENSE—See AMENDMENTS.

NOTICE OF SPECIAL DEFENSE—See PLEADING (6).

NUNC PRO TUNC ORDER—See ABATEMENT AND REVIVAL (2); EQUITY (4).

OBSCENITY—See ARREST; CARRIERS (2); MASTER AND SERVANT (9)

OFFICERS AND AGENTS—See INSURANCE (10); PARTNERSHIP ASSOCIATIONS (1).

OFFICIAL ACTION—See EVIDENCE (7).

OPERATION OF CARS—See MASTER AND SERVANT (1, 7); STREET RAILWAYS (3).

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OPINION EVIDENCE—See MASTER AND SERVANT (2, 8); MUNICIPAL CORPORATIONS (3).

OPINIONS—See FRAUD (5); MUNICIPAL CORPORATIONS (3).

ORDINANCES—See CRIMINAL LAW (1).

PAROL CONTRACT—See ATTORNEY AND CLIENT (7); CONTRACTS (3, 13); EVIDENCE (17, 20, 21).

PAROL EVIDENCE RULE—See SALES (12); WILLS (5).

PAROL EXTRINSIC EVIDENCE—See CONTRACTS (14).

PAROL WAIVER—See LANDLORD AND TENANT (3, 4).

PARTIES—See INTERPLEADER (3); VENUE (1).

PARTITION—See WILLS (9).

PARTNERSHIP ASSOCIATIONS.

1. A single manager or agent of a limited partnership association cannot by a contract in its name render the association liable in an amount exceeding $500. 2 Comp. Laws, § 6083. *Geel* v *Goulden*, 414.

2. Under a land contract, conveying to an officer of a partnership association real property that thereafter he assigned to the association, which surveyed and platted it, paying taxes on the premises and installments on the contract, the partnership was not bound unless the contract was signed and executed by two managers as required by statute. *Id.*

3. In the light of the express prohibition of the statute, the association was not bound by estoppel to pay the contract debt, and could, at any time, invoke the aid of the statute to avoid liability. *Id.*

4. But the partnership association is estopped in equity from attempting to recover back any of the consideration paid voluntarily to the vendor, and its cross-bill is dismissed. *Id.*

See CONTRACTS (9, 10); VENDOR AND PURCHASER (2).

PASSENGERS—See CARRIERS (13).

PASSENGERS CHANGING CARS—See CARRIERS (6).

PAVING—See TAXATION (1).

PAYMENT INTO COURT—See ATTORNEY AND CLIENT (9).

PER CAPITA DISTRIBUTION—See WILLS (7).

PERFORMANCE—See SALES (5, 6).

PERPETUITIES—See WILLS (5).

PERSONAL INJURIES — See ATTORNEY AND CLIENT (7); CARRIERS (7, 11); CORPORATIONS (1); ESTOPPEL (1); EVIDENCE (7, 14, 15); MASTER AND SERVANT; PLEADING (1, 5); STREET RAILWAYS (1, 2)

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PERSONAL PROPERTY—See REPLEVIN (1).

PETITION—See ATTORNEY AND CLIENT (1).

PHYSICAL CONDITION OF WITNESS—See EVIDENCE (12).

PHYSICIANS AND SURGEONS—See EVIDENCE (15); TRIAL (5).

PLEA—See EQUITY (5); PLEADING (2, 6); PROCESS (2).

PLEADING.

1. Plaintiff may set out his cause of action in different counts of his declaration, with as many different but consistent averments of acts of negligence causing the injury, as he sees fit, in order to meet possible evidence as it may develop on the trial. *Creen* v. *Michigan Cent. R. Co.*, 104.

2. On special demurrer to the declaration it must be considered more critically than after a plea on objection raised at the trial. *Id.*

3. In order to avoid the objection of duplicity, a declaration should not join allegations of common law and statutory duties in one count. *Id.*

4. Averments of related facts not contradictory, logically connected with a single injury and capable of jointly or separately contributing to or causing it, may be joined in one count. *Id.*

5. There was no sufficient ground of objection to a declaration for the wrongful death of plaintiff's intestate, caused by the explosion of a locomotive boiler, where the pleading charged in one count in separately numbered paragraphs that it was defendant's duty: (1) to have provided a boiler of sufficient strength, etc., to withstand the expansive force of the steam; (2) to have employed inspectors and others who were competent to examine and to keep the appliances connected therewith in safe condition; (3) to have inspected the boiler and its several parts; (4) to have had the water glass cleaned and properly prepared; (5) to have had the inspectors inspect the bolts, rivets, joints, etc.; (6) to have repaired the burned and warped iron of the fire box and water space; and where breaches of said duties were averred in corresponding paragraphs, separate and numbered. *Id.*

6. Although defendant's original plea and notice in justice's court set up a breach of warranty of quality of the goods purchased by defendant's wife, in assumpsit by the seller for the purchase price, plaintiff was not authorized to rely on any claimed admission of liability under the notice (Circuit Court Rule 7 *e*), where defendant, on discovering the nature of the contract that plaintiff claimed to have made with defendant's wife, amended his plea and notice so as to deny any liability thereon. *Hickey* v. *Lundy*, 306.

See ASSUMPSIT (1, 3), CONTRACTS (13); EQUITY (5); SALES (7).

PLEDGE—See FRAUD (2).

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POLICE OFFICERS — See ARREST; CARRIERS (13); MASTER AND SERVANT (35, 36).

POLICE POWER — See AUTOMOBILES (1); CONSTITUTIONAL LAW (6); INTOXICATING LIQUORS (2, 5).

POSSESSION—See BOUNDARIES (2); REPLEVIN; TRUSTS (1, 2).

PRACTICE—See APPEAL AND ERROR (8, 9, 11); ATTORNEY AND CLIENT (3); CREDITOR'S SUIT (1); EQUITY (3, 4); MORTGAGES (1).

PREJUDICIAL MISCONDUCT—See TRIAL (5).

PRELIMINARY EXAMINATION—See CRIMINAL LAW (2).

PRESUMPTIONS—See CONTRACTS (6, 7); EVIDENCE (10); LIBEL AND SLANDER (11, 13); WILLS (2).

PRINCIPAL AND AGENT.

1. An employer is not liable for wilful and malicious acts of an employé not authorized or ratified. *Ducre* v. *Sparrow-Kroll Lumber Co.*, 49.

2. Agency in fact may be implied where one person, by his conduct, holds out another as his agent and thereby invests him with apparent or ostensible authority as agent. *Cronk* v. *Mulvaney*, 346.

3. Acts and admissions of defendant, after the commencement of suit, tending to show his acquiescence in the things done by his agent, were competent evidence against him. *Id.*

See BROKERS; INSURANCE (1, 10); INTOXICATING LIQUORS (8); MASTER AND SERVANT (9, 35, 36); SALES (10); VENDOR AND PURCHASER (2).

PRINCIPAL AND SURETY—See SALES (13).

PRIOR NEGOTIATIONS—See CONTRACTS (3).

PRIVILEGE—See LIBEL AND SLANDER (1, 7).

PRIVILEGED COMMUNICATIONS — See INTOXICATING LIQUORS (10).

PRIVILEGED INFORMATION—See EVIDENCE (15).

PROBATE COURT.

Where complainants lost, by failure to act seasonably, their opportunity to prosecute their rights in probate court, chancery does not obtain jurisdiction to set aside the orders made. *Davis* v. *McCamman*, 587.

PROCESS.

1. By a voluntary appearance and by consenting to a stipulation extending the time to plead in an action of assumpsit, on a claim that accrued outside of the State, a foreign corporation whose president was served with process while temporarily within the State waives its right to question the validity of

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PROCESS—Continued.

such service, and submits itself to the jurisdiction of the court. *National Coal Co.* v. *Cincinnati, etc., Mining Co.*, 195.

2. The object of such stipulation extending the time to plead is consistent only with a general appearance. *Id.*

3. In a suit to foreclose a mortgage on realty, an affidavit for an order of substituted service conferred jurisdiction where it averred that affiant was the solicitor for complainant, a non-resident, and was informed by his client and believed that the defendants resided in Chicago, Illinois. 1 Comp. Laws, § 485. *Powell* v. *Pierce*, 427.

See CORPORATIONS (1); JUSTICES OF THE PEACE.

PROMISE TO REPAIR—See MASTER AND SERVANT (34).

PROPERTY RIGHTS—See INTOXICATING LIQUORS (2, 5).

PROXIMATE CAUSE—See MASTER AND SERVANT (20).

PUBLICATION—See LIBEL AND SLANDER (1, 12).

PUBLIC OFFICERS—See LIBEL AND SLANDER (7, 9, 13); QUO WARRANTO.

PUBLIC WORKS—See MUNICIPAL CORPORATIONS (1).

QUALIFIED PRIVILEGE—See LIBEL AND SLANDER (8, 9, 12).

QUALITY—See SALES (7).

QUESTIONS REVIEWABLE—See CERTIORARI (1); EJECTMENT (5); TRIAL (6).

QUO WARRANTO.

1. Proceedings in the nature of quo warranto to test title to public office should be commenced before the term has expired or is near the time of expiration, although if commenced seasonably the action may be prosecuted to final judgment after the term has expired, for the recovery of damages or costs claimed by relator. *Osterhous, ex rel. Vander Veen*, v. *Van Duren*, 464.

2. Since the court will exercise its discretion to proceed to final judgment after the term of office, only in case public interests require it, a demurrer to an information in the nature of quo warranto was rightly sustained where respondent's term of office as justice of the peace expired July 4, 1911, and the proceeding was not instituted until June 22, 1911. *Id.*

RAILROADS.

1. The failure of the driver of a vehicle to hear the audible rumble of a fast train, hear its bell, or whistle, or to see a brilliantly lighted train, with a headlight burning, visible 370 feet away at a point 56½ feet from the track, 580 feet away at a point 46½ feet from the track, and 1,500 feet away at a point 26½ feet from the track, was contributory negligence, in the absence of evidence that he stopped, looked, and lis-

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RAILROADS—Continued.

tened before crossing the right of way. *Guntermann* v. *Michigan Cent. R. Co.*, 87.

2. Evidence that defendant's engineer, seeing the infant on the track soon enough to have stopped his train, did not do so, merely sounding his whistle and continuing until he was too near to avoid an accident, had a tendency to show negligence justifying a verdict for plaintiff. *Morse* v. *Detroit, etc., R. Co.*, 99.

3. On a spur used for logging purposes less than twelve miles in length, having no switches, stations, or regular stopping places, telephones, telegraph, or schedule trains, the general rules in use for the operation and maintenance of main lines of railroad are impracticable and inapplicable. *Ingersoll* v. *Detroit, etc., R. Co.*, 380.

4. It was error, in an action for the death of a railroad employé, killed in a collision between a work train on which he was riding along such spur or branch line, with a loaded car left on the track, at night, to refuse to charge the jury that the notice and warning possessed by plaintiff's decedent, relative to the conditions and system of operating the branch line, and the custom of leaving cars on the line without lights or warning signals, barred plaintiff's recovery. *Id.*

See ATTORNEY AND CLIENT (7); CARRIERS (1, 2, 13); CONSTITUTIONAL LAW (1-8); ESTOPPEL (1); EVIDENCE (1-4); INJUNCTION; MASTER AND SERVANT (1-8, 14-20, 35); PLEADING (1, 5).

RATE OF SPEED—See STREET RAILWAYS (5, 6).

RATIFICATION — See BROKERS; PRINCIPAL AND AGENT (1, 3); SALES (10); TROVER AND CONVERSION (2).

REAL PROPERTY—See BOUNDARIES; TRUSTS (3, 4).

REASONABLE TIME FOR REJECTION—See SALES (2).

REBATE OF LICENSE FEE—See INTOXICATING LIQUORS (7).

RECALL OF PROCESS—See EXECUTION.

RECORD—See APPEAL AND ERROR (1).

RECOUPMENT—See SALES (7).

RENEWAL OF LEASE—See LANDLORD AND TENANT (6).

RENEWAL OF LICENSE—See INTOXICATING LIQUORS (14, 15).

REPAIRS—See EVIDENCE (14).

REPAYMENT OF LICENSE FEE—See INTOXICATING LIQUORS (6).

REPLEVIN.

1. After the severance of crops from the realty, they become personal property and are recoverable by one having the right of possession in an action of replevin. *Cronk* v. *Mulvaney*, 347.

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REPLEVIN—Continued.

2. Defendant unlawfully in possession of property under a void execution may not defend against an action of replevin on the ground that no demand was made, where it appeared that he would have refused the demand in any event. *Rameau* v. *Valley*, 569.

See CUSTOMS AND USAGES.

REPORTS OF OFFICERS—See EVIDENCE (8).

REQUESTS TO CHARGE — See APPEAL AND ERROR (2); CRIMINAL LAW (6).

RESCISSION—See SALES (1).

RESERVATIONS—See LANDLORD AND TENANT (1).

RES GESTÆ—See EVIDENCE (9); HOMICIDE (1).

RESIDENCE—See CORPORATIONS (2); VENUE.

RESIDENCE DISTRICT—See INTOXICATING LIQUORS (13).

RESISTING OFFICER—See ARREST.

RES JUDICATA—See EQUITY (5); ESTOPPEL (2).

RESULTING TRUSTS—See TRUSTS (3).

RETURN OF GOODS—See SALES (1).

REVISION OF SPECIAL ASSESSMENT ROLL—See TAXATION.

REVOCATION OF LICENSE—See INTOXICATING LIQUORS (4).

RIPARIAN RIGHTS—See BOUNDARIES (1).

ROADBED—See MASTER AND SERVANT (7, 14, 15, 17).

RULES—See MASTER AND SERVANT (2-5); RAILROADS (3).

SALES.

1. Where defendant purchased a quantity of rubbers of plaintiff upon the understanding that if they were not satisfactory defendant could return them, but the purchaser, not effecting any sales for some time, wrote plaintiff asking for an extension of time, which plaintiff refused, and where defendant, having received back from her customers certain rubbers that proved defective, notified the plaintiff of the fact, and afterwards returned the shipment, stating that since plaintiff refused to grant the extension of time she returned the goods, defendant was not limited to the ground of objection stated in her first letters, and the verdict for defendant was supported by the testimony. *Edwards Stanwood Shoe Co.* v. *Curtis*, 124.

2. The delay in inspecting and rejecting lumber bought on 60 days' credit, beyond a reasonable time for examining and refusing the merchandise, was not excused merely because of inconvenience to defendant. *Stone* v. *Frohlich*, 128.

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SALES—Continued.

3. A delay of 28 days before inspecting, and of more than 60 days before notifying the shipper that the lumber was deficient in quality, was unreasonable, as a matter of law. *Id.*

4. Where defendant's testimony showed that the lumber was short in measure, and the court, after asking defendant how much shortage he claimed, deducted the total amount thereof at its highest value from plaintiff's claim, and directed a verdict for the remainder, defendant was not prejudiced. *Id.*

5. The term "West Virginia Smokeless coal," used in a contract for the sale of a quantity of coal, was, under the undisputed evidence, a trade term used to describe coal mined in a certain district, and defendant could not recoup for plaintiff's failure to deliver a literally smokeless coal if the coal delivered corresponded to the description. *National Coal Co.* v. *Cincinnati, etc., Mining Co.*, 198.

6. It was a proper question for the jury, under conflicting evidence, whether or not the coal delivered conformed to the contract on which plaintiff brought suit. *Id.*

7. Upon defendant's notice of recoupment, it was entitled to recover the difference between the contract price and the price at which coal of a similar quality could be purchased in the open market, and without proper pleadings and proof that defendant could not purchase the same coal elsewhere and had no opportunity to furnish a substitute, it could not recover the profits lost. *Id.*

8. Within the provisions of a contract, stipulating that defendant's wife should pay as rental one dollar weekly for certain clothing, which she might purchase at the end of the term on paying one cent additional, and that the contract was not intended as one of sale, conditional or otherwise, defendant could not be held on the theory that plaintiff had sold necessaries to the wife of defendant. *Hickey* v. *Lundy*, 336.

9. The contract being express, the law will not imply one. *Id.*

10. And in the absence of testimony that the wife acted as defendant's agent, or that her act was ratified by him, a verdict for defendant was properly directed. *Id.*

11. In an action for breach of an implied warranty of motor trucks, which proved to be worthless, any implied warranty of fitness was excluded by clauses in the written contract of sale providing for prompt replacement of all defective parts, and requiring the purchaser to make all claims on account of defective equipment not made by the seller to the respective manufacturers of such portions. *Hall* v. *Duplex-Power Car Co.*, 634.

12. Evidence of an express warranty, not included in the writing, was incompetent. *Id.*

13. Defendant sold his dry goods business, taking a chattel mortgage from the purchaser to secure part of the purchase price. It was stipulated in the mortgage that if defendant should become guarantor for any goods ordered by the purchaser of

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SALES—Continued.

the stock of merchandise the amount guaranteed should be added to and secured by the chattel mortgage Plaintiff secured an order from the purchaser and wrote to defendant to guarantee the account. Defendant replied to send the goods and bill in his name. Plaintiff shipped the goods to the purchaser who gave the order, and charged defendant with the shipment. *Held*, that in the light of the surrounding circumstances, defendant was liable as the principal and that plaintiff was not required to ship the goods directly to him. *Carson, Pirie, Scott & Co.* v. *Jozwiak*, 673.

See FRAUD (2, 5, 6).

SAVING QUESTIONS FOR REVIEW — See APPEAL AND ERROR (6, 10, 11, 13); EJECTMENT (5); TRIAL (6).

SCHOOLS AND SCHOOL DISTRICTS.

1. Free public libraries are within the proper range of school apparatus and are supplemental to, and a part of, the educational system of the State. *Attorney General, ex rel. McRae*, v. *Thompson*, 511.

2. School boards are separate and distinct municipal corporations and State agencies. *Id.*

3. Education in Michigan is not a part of the local self-government inherent in the townships or municipalities except in so far as the legislature may choose to make it so. *Id.*

4. It was the intent of the Constitution to separate the school organization from the general municipal government. *Id.*

See MUNICIPAL CORPORATIONS (6, 7, 9).

SCOPE OF AUTHORITY—See PRINCIPAL AND AGENT (1).

SEPARATION OF JURY—See CRIMINAL LAW (3).

SERVICE BY PUBLICATION—See PROCESS (3).

SET OFF AND RECOUPMENT—See SALES (7).

SETTING ASIDE ARBITRATION AWARD—See EXECUTION.

SPECIAL ASSESSMENTS—See TAXATION.

SPECIAL DEMURRER — See APPEAL AND ERROR (8); PLEADING (2).

SPECIAL VERDICT—See APPEAL AND ERROR (4).

SPECIFIC ASSIGNMENT—See APPEAL AND ERROR (10).

STATE BID—See EJECTMENT (4).

STATE FACTORY INSPECTOR—See EVIDENCE (7).

STATE LEGISLATURE—See CONSTITUTIONAL LAW (4).

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STATUTES.

If possible, the court should give effect to every word, clause, and sentence of a statute, and should reconcile the different provisions so as to render the act consistent. *Rohde* v. *Wayne Circuit Judge*, 683.

See AUTOMOBILES (2); CHATTEL MORTGAGES; CONSTITUTIONAL LAW (5); DIVORCE (2); INSURANCE (6); INTOXICATING LIQUORS (3, 6, 11, 13, 14); MASTER AND SERVANT (23, 25); MUNICIPAL CORPORATIONS (4, 7, 8); PARTNERSHIP ASSOCIATIONS (1–3); TAXATION; TRIAL (3); TRUSTS (3); VENUE (1); WITNESSES (1).

STATUTORY BONDS—See MUNICIPAL CORPORATIONS (5).

STATUTORY CONSTRUCTION—See INTOXICATING LIQUORS (1); STATUTES.

STIPULATIONS—See ABATEMENT AND REVIVAL (1); CONTRACTS (15); ESTOPPEL (1); PROCESS (1, 2).

STOCK AND STOCKHOLDERS—See FRAUD (2).

STREET RAILWAYS.

1 It was contributory negligence for a person, carrying an open umbrella on a rainy day, after looking for a car at the curb of a street, and seeing one approach half a block distant, to cross the track 11½ feet distant from the curb, without again looking. *Manos* v. *Detroit United Ry.*, 155.

2. A passenger who, on alighting from a west-bound car and crossing the first of the defendant's double tracks, looked west and saw no car, but stepped upon the second or east-bound track without again looking and was struck by a car coming from the west which there was nothing to prevent her from seeing except the car from which she alighted, was guilty of contributory negligence as a matter of law. *Clark* v. *Detroit United Ry.*, 457.

3. That a motorman of an interurban railroad failed to ring his gong, and instead, tried to stop the car in order to avoid killing a colt on the track, was not negligence merely because the event proves the way he selected was not the best to meet the exigency. *Nissly* v. *Detroit, etc., R. Co.*, 676.

4. And it was error to charge the jury that it was his duty to use all means at his command to avoid the accident, that if he failed to employ all reasonable means within his power to avoid the accident, or if he was careless, reckless, or indifferent, he would be guilty of negligence, and that under ordinary circumstances it would have been his duty to ring his gong, and failure to do so would be evidence of negligence. *Id.*

5. Whether a rate of speed of forty miles an hour was reasonable, along a public highway, was for the jury. *Id.*

6. While the motorman owed no duty to reduce his speed below a rate that would otherwise be reasonable, not being bound to

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STREET RAILWAYS—Continued.

anticipate that plaintiff's horse was at large, if he was running the car so rapidly that he could not have stopped it within such distance as the colt could have been seen upon a straight track, the question of negligence was for the jury. *Id.*

7. The owner of a colt who permits it to run at large in a highway over which an electric road is operated, or who carelessly permits it to escape, is guilty of contributory negligence. *Id.* 677.

See CARRIERS (8-12); CORPORATIONS.

SUBSCRIPTION—See CHATTEL MORTGAGES.

SUBSEQUENT AGREEMENT—See CONTRACTS (4).

SUPREME COURT — See APPEAL AND ERROR (9); MORTGAGES (2).

SURPLUS—See MORTGAGES (4).

SURRENDER OF LIQUOR LICENSE—See INTOXICATING LIQUORS (14).

SURVIVAL ACT—See EVIDENCE (4).

SYMPATHY OF JURY—See EVIDENCE (19).

SYSTEM OF OPERATION—See RAILROADS (8).

TAKING TESTIMONY—See ATTORNEY AND CLIENT (8)

TAXATION.

1. The revision of a special assessment roll for paving a street or the making of a new roll must be done by the board of assessors, not by the common council in reviewing the assessment. 1 Comp. Laws, § 3205. *Johnson* v. *City of Escanaba*, 276.

2. The power of the common council to correct the roll as to any assessment or description does not authorize the council to adopt a new basis of distributing the tax; its authority is limited to corrections of mathematical errors in computing amounts or mistakes in descriptions of property assessed. 1 Comp. Laws, §§ 3193-3205. *Id.*

See CONSTITUTIONAL LAW (8); EJECTMENT (2-4); INTOXICATING LIQUORS (1); MORTGAGES (3); MUNICIPAL CORPORATIONS (9).

TAX TITLE—See EJECTMENT (2).

TENDER—See ATTORNEY AND CLIENT (9); EJECTMENT (4).

TERM—See LANDLORD AND TENANT (6).

TIME TO INSTITUTE PROCEEDINGS—See QUO WARRANTO.

TITLE—See BOUNDARIES (2); EJECTMENT; TRUSTS (3).

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TORTS OF AGENT—See MASTER AND SERVANT (9, 35); PRINCIPAL AND AGENT (1).

TOWNSHIPS — See HIGHWAYS AND STREETS; INTOXICATING LIQUORS (14).

TRADE NAME—See CONTRACTS (9, 10); SALES (5).

TRADE TALK—See FRAUD (5).

TRAIN DISPATCHER—See MASTER AND SERVANT (1, 7, 8).

TRAINS DEFINED—See MASTER AND SERVANT (3).

TRESPASS—See BOUNDARIES (2).

TRIAL.

1. Wide latitude in the cross-examination of plaintiff's chief witness was permissible. *J. H. Worden Lumber & Shingle Co.* v. *Minneapolis, etc., R. Co.*, 74.

2. It was reversible error for defendant's counsel, in an action for negligently causing a fire, to persist in bringing to the attention of the jury the fact that plaintiff was insured after the court had ruled it out. *Id.*

3. Plaintiff was authorized, under Act No. 307, Pub. Acts 1909, to subpoena and call for cross-examination an agent of defendant who, at the time of the sale, was in defendant's employ. *National Coal Co.* v. *Cincinnati, etc., Mining Co.*, 198.

4. Reference of a general sort by the prosecuting attorney to the fact that respondent and his witnesses were foreigners was not reversible error. *People* v. *Sartori*, 309.

5 Persistent attempts by defendant's attorney to ask of a physician questions calling for information of a privileged nature, under repeated objection by plaintiff's attorney, and numerous adverse rulings of the court, for the sole purpose and with the obvious intent of prejudicing the jury, was reversible error. *Thomas* v. *Township of Byron*, 593.

6. Exceptions to argument of counsel made without calling on the trial court for a ruling thereon are not reviewable. *Crane* v *Ross*, 624.

See APPEAL AND ERROR (2, 3, 7); ASSUMPSIT (3); CARRIERS (10); CONTRACTS (2, 13, 15), CRIMINAL LAW (2-4); EVIDENCE (1, 11, 19), FRAUD (1), LIBEL AND SLANDER (7, 11); MASTER AND SERVANT (8, 15), TROVER AND CONVERSION (1).

TRIAL WITHOUT JURY—See APPEAL AND ERROR (11).

TROVER AND CONVERSION.

1. There was evidence sufficient to present a question of fact as to one of the defendants who took charge of plaintiff's insurance matters, advised him to employ the defendant insurance adjusters to settle the amount of plaintiff's loss, and who turned over to the adjusters, against plaintiff's protest, an excessive amount as compensation for their services out of

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TROVER AND CONVERSION—Continued.

the proceeds of the insurance money, in contravention of plaintiff's agreement with his creditors. *Dillon* v. *Craig*, 216.

2. It was not a ratification of any alleged wrongful acts that plaintiff, after learning of the payment to the adjusters, indorsed over to them, in pursuance of his agreement with the creditors, other checks and drafts received. *Id.* 217.

TRUSTS.

1. Where one of two partners engaged in the manufacture of lumber products executed a note to defendant bank in order to obtain money to cover a shortage in public funds controlled by him, and also executed a mortgage upon his partnership and other property to an officer of the creditor, agreeing that the creditor or its officer should have the right to take possession of the real and personal property conveyed but not of the lumbering business, if at any time they deemed themselves insecure, and where the said officer thereafter took possession of the lumbering business, with the knowledge and consent of the debtor, leaving the partner in control as manager, the relation between the creditor's representative and the debtor was that of trustee and beneficiary and in the conduct of the business the trustee owed the duty to exercise ordinary care and prudence to avoid losses, overcharges, and unreasonable expenditures. *Steward* v. *Traverse City State Bank*, 258.

2. It was error, in an accounting in equity, to charge the creditor or its representative with the value of any of the property employed in the business on the theory that it was wrongfully appropriated, under a bill of complaint framed on the theory that complainant was entitled to an accounting for the profits of the business and to have them applied in reduction of complainant's debt, and containing no averment that complainant gave no authority to take possession of the business. *Id.* 259.

3. Under the provisions of 3 Comp. Laws, § 8885, abolishing resulting trusts where the title of real property is taken in the name of another than the person who furnished the consideration, no trust was created by the purchase of a farm with money of complainant, who caused the title to be conveyed to his daughter, intending that she should reconvey to him if he should so desire. 3 Comp. Laws, § 9509. *Sherwood* v. *Davis*, 398.

4. In order to satisfy the provisions of section 9509, 3 Comp. Laws, a written instrument granting or vesting some estate in complainant must be produced or its loss accounted for and contents established by competent evidence. *Id.*

5. Evidence of general statements of a decedent that she had agreed to execute a conveyance at a later time, do not establish the execution and existence of such an instrument. *Id.*

UNPROFESSIONAL CONDUCT—See ATTORNEY AND CLIENT (4).

VACATING STREETS—See INJUNCTION (1)

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VENDOR AND PURCHASER.

1. Knowledge of the fact that a land contract was never signed by the vendee will be imputed to the vendors of land who held in their possession one of the original written instruments that were prepared in duplicate, for a period of several years, accepting numerous payments on the instrument. *Geel* v. *Goulden*, 413.

2. And when a real estate broker, acting for the vendors, knew that the instrument was drafted with the name of an officer as grantee of the defendant, a partnership association, and that the officer had no personal interest in the deal, and that he assigned the contract to the association immediately thereafter; the broker being an agent of complainants, they were chargeable with the knowledge that he had. *Id.* 414.

3. As to such defendant assignor, complainants' bill to foreclose the land contract was properly dismissed. *Id.*

See PARTNERSHIP ASSOCIATIONS; TRUSTS (3).

VENUE.

1. One residing in the county of St. Clair may not file a bill of complaint in the circuit court for the county of Chippewa against a party defendant that is a resident of the Dominion of Canada to restrain the taking of depositions of certain witnesses in a criminal proceeding pending in the Canadian courts. 1 Comp. Laws, § 434. *Titus* v. *Chippewa Circuit Judge*, 507.

2. The subject-matter of such suit not being local, as required by the provisions of said law, the proceeding must be instituted in the county where plaintiff resided. *Id.*

3. The question of jurisdiction was properly raised by a demurrer clause in defendant's answer, upon which the hearing could only take place at the time of final hearing. *Id.*

See ABANDONMENT; CORPORATIONS.

VESTED ESTATES—See WILLS (6).

VESTED INTEREST—See INTOXICATING LIQUORS (2).

VILLAGES—See CRIMINAL LAW (1); INTOXICATING LIQUORS (11).

VIOLATION OF CRIMINAL STATUTE—See CONTRACTS (9).

VOLUNTARY PAYMENTS—See PARTNERSHIP ASSOCIATIONS (4).

WAIVER—See APPEAL AND ERROR (13); CRIMINAL LAW (5); EQUITY (6); INSURANCE (2, 7, 10); LANDLORD AND TENANT (1, 6); PROCESS (1).

WARNER-CRAMTON ACT—See INTOXICATING LIQUORS (1, 8, 11, 14).

WARNING AND INSTRUCTING SERVANT—See MASTER AND SERVANT (11-13, 31)

WARRANTY—See INSURANCE (6); LANDLORD AND TENANT (5); SALES (1, 11, 12).

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WATER SUPPLY—See MUNICIPAL CORPORATIONS (1)

WEATHER REPORTS—See EVIDENCE (8).

WEIGHT OF EVIDENCE—See INTOXICATING LIQUORS (9); NEW TRIAL.

WILLS.

1. It is a sufficient attestation of a holographic will, that the witnesses signed the instrument at the request of testator in his presence, after his declaration that it was his will, though without seeing his signature. *In re Dougherty's Estate*, 281.

2. From the fact that the will was written by testator, was signed when found, was in testator's desk in an envelope addressed in his writing, from the fact that he requested the witnesses to sign it and acknowledged it as his will, being in his right mind, etc., a presumption arose that he had signed the testament before the witnesses subscribed their names. *Id.*

3. The court properly submitted to the jury the question whether the will was signed by testator at the time he asked the witnesses to attest it. *Id.* 282.

4. A devise by testatrix to her brother, followed by a declaration in a succeeding clause of the will that it was the wish and desire of testatrix that her nephew, a beneficiary under the will, should have an equal share in the property so devised with other children of the devisee at the death of such brother, operates as a conveyance of the fee simple; the language in the separate and succeeding clause operating merely as an expression of a desire, does not limit the estate conveyed. *Schram* v. *Rogers*, 840.

5. *Held*, that the terms of a will devising property to testator's sister, if she survived her husband, and in case of her death during the husband's life, to her children, and if any of them died under age and without issue the share of deceased to go to the remaining children, and providing that it was testator's will to exclude such husband from participation in the estate, were not so ambiguous as to require the aid of parol evidence, and did not violate the statute prohibiting perpetuities. (3 Comp. Laws, § 8797). *Van Gallow* v. *Brandt*, 642.

6. The law favors the construction of a will, if possible, so as to create vested estates. *Id.* 643.

7. As a general rule claimants take *per stirpes* only when they stand in unequal degrees of relationship to testator, and are of different classes, but when they are of equal degree of relationship and of the same class they take *per capita*. *Id.*

8. A direction for division of certain specified property between members of a group, share and share alike, is construed as a direction to distribute *per capita*. *Id.*

9. Under a bill of complaint to construe a will, praying for a partition of decedent's estate, which contained both real and personal property, the court in chancery properly decreed

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WILLS—Continued.

that the probate court should make the distribution and partition in assigning the residue of the estate. *Id.*

See EVIDENCE (20, 21).

WITNESSES.

Under Act No. 307, Pub. Acts 1909, permitting a party to call for cross-examination agents and employés of the opposite party, the testimony of defendant's employés or servants so introduced by plaintiff was a part of his case, and the witnesses were not defendant's witnesses. *Jones* v. *Pere Marquette R. Co.*, 2.

See EVIDENCE (5, 12); INTOXICATING LIQUORS (10); TRIAL (1); WILLS (1).

WORDS AND PHRASES — See ESTOPPEL (4); INSURANCE (4); INTERPLEADER (1); INTOXICATING LIQUORS (14); MASTER AND SERVANT (8, 24).

WORDS LIBELOUS PER SE—See LIBEL AND SLANDER (2, 4).

WORK AND LABOR — See CONTRACTS (7, 8); CUSTOMS AND USAGES.

WRITTEN CONTRACT — See CONTRACTS (8, 12–14); EVIDENCE (17); LANDLORD AND TENANT (4).

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